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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-208

ROBERT T. CARSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Robert T. Carson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his criminal conviction.

Opinion Below

The opinion of the Court of Appeals is not yet reported. It is set forth in Appendix A to this petition (1a).*

Jurisdiction

The opinion of the Court of Appeals was filed on July 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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* The Appendices to this Petition are submitted in a separate bound Volume.

Constitutional and Statutory Provisions Involved

(1) The Fifth and Sixth Amendments to the United States Constitution.

(2) 18 U.S.C. §§ 2 (Principals); 201 (Bribery of public officials and witnesses); 371 (Conspiracy); 1621 (Perjury); and 1952 (Interstate and foreign travel or transportation in aid of racketeering enterprises).

These provisions are set forth in Appendix B to this petition (27a).

Questions Presented

I. Where a Congressional aide, whose work involved limited dealings with the Department of Justice, allegedly participated in a plan whereby he was to be compensated in return for exerting personal or political influence upon an officer of the Department of Justice for the purpose of altering the course of a federal prosecution, are the activities of the Congressional aide in this regard "official acts" or "acts in violation of his lawful duty" as those terms are defined in 18 U.S.C. § 201?

II. Where, following the abandonment of the plan set forth above, the same aide allegedly participated in a plan whereby he was to be compensated in return for exerting some unspecified influence upon unspecified persons for the purpose of securing a lenient sentence for someone yet to be convicted, does his participation in such a plan involve his own "official acts" or "acts in violation of his lawful duty" as those terms are defined in 18 U.S.C. § 201?

III. If either question I or question II is answered in the negative, must the Petitioner's conviction under the conspiracy count, which charged both objectives, be reversed since the Court's charge permitted the jury to convict

if it found the Petitioner to be the subject of a bribe for the purpose of attaining either one of these objectives?

IV. Under the circumstances of this case, was the Petitioner deprived of a fair trial when the Deputy Attorney General of the United States, in his testimony as a prosecution witness, was called upon to, and did, combine his personal knowledge with unspecified hearsay for the purpose of giving the jury his opinion that the Petitioner was guilty of the crimes charged?

V. Under the circumstances of this case, did the Petitioner's claim of Congressional and Fifth Amendment privilege, before the Grand Jury, constitute an effective recantation of the testimony which had just previously been given by him, so as to negate a charge of perjury based upon that testimony?

VI. Did the prosecutor's credibility and personality become such central factors during the trial that the Petitioner was deprived of a fair trial?

Statement of the Case

A. The Charges

An indictment was filed on January 13, 1971, in four counts against petitioner and two co-defendants, Edward Adams and Joseph Bald. Count One charged the three defendants with conspiracy to travel in interstate commerce in furtherance of the unlawful activity of bribery, in violation of Title 18, United States Code, § 371. Counts Two and Three charged the three defendants with traveling in interstate commerce in furtherance of the unlawful activity of bribery, in violation of Title 18, United States Code, § 1952. Count Four charged petitioner alone with perjury before a federal grand jury, in violation of Title 18, United States Code, § 1621.

The petitioner was tried alone. The jury found him guilty on Counts One and Four (conspiracy and perjury),

and not guilty on Counts Two and Three (interstate travel to promote bribery) of the indictment.

On January 4, 1972, petitioner was sentenced to concurrent terms of imprisonment for 18 months on each count and fined $5,000 on Count One.

B. Summary

Through the testimony of one co-defendant, a co-conspirator and an undercover F.B.I. agent, allegedly corroborated by tape recordings, the Government sought to prove that petitioner, the Administrative Assistant to a United States Senator, joined in a conspiracy, the main objects of which were to receive a bribe and to pay a bribe to high-ranking officials of the Department of Justice to quash investigations into Securities Act violations and to obtain leniency for one of the subjects of the investigations once he had been indicted. The Government further sought to prove that petitioner lied under oath to a federal grand jury when he denied knowing or hearing of the other members of the conspiracy.

The petitioner testified in his own behalf at trial and denied being a party to the scheme, maintained that a $2,500 cash payment received from his co-defendant was a campaign contribution, and claimed his grand jury testimony was not knowingly and intentionally false. Another defense witness and documentary evidence were used by the defense to corroborate petitioner's testimony.

C. The Background and Relationships of the Various Individuals Involved

An understanding of the facts and legal issues requires a familiarity with the background and relationships of the various individuals involved. We will here set forth that background up to, but not including, the point at which the petitioner is alleged to have become a participant in the conspiracy charged by the indictment.

1. *Petitioner Robert T. Carson*—At his trial, petitioner testified as a witness in his own behalf. He is a citizen of the State of Hawaii, where, in his earlier years, he was an investment banker and president of the Honolulu Stock Exchange. He has held every significant office in the Republican party there and was its Chairman for eight years. In January, 1962, following service as Director of the Federal Housing Administration for Hawaii and Guam, he was appointed Administrative Assistant to United States Senator Hiram Fong of Hawaii. On April 25, 1968, pursuant to Rule XLIII of the United States Senate, he was authorized to raise, receive and manage political funds in behalf of Senator Fong. At the time of the events of this case, he was the president of the United States Senate Staff Club, having previously served two terms as president of the Administrative Assistants' Association for the United States Senate (Tr. 1323-33).*

2. *Richard Kleindienst*—At petitioner's trial, Mr. Kleindienst testified as a witness for the Government.

During the period leading to the Republican National Convention of 1968, petitioner was active in behalf of the candidacy of Richard M. Nixon. In that regard, he worked closely and met frequently with Mr. Kleindienst, who was then National Director of Field Operations for Nixon's campaign committee. After the election, Kleindienst was named Deputy Attorney General of the United States, a position characterized as "Number 2 man in the Department of Justice" (Tr. 1139-40, 46-47).**

Among Kleindienst's duties was the responsibility for making recommendations to the President, through the

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* In this petition, references to the trial transcript are preceded by "Tr."; references to the Appendix filed in the Court of Appeals are preceded by "A"; and references to the Appendices annexed to this petition are followed by "a".

** During the pendency of the appeal herein, Mr. Kleindienst was elevated to the position of Attorney General of the United States.

Attorney General, for appointments of Federal, District and Circuit Court Judges, United States Attorneys and United States Marshals. In that capacity, Kleindienst would confer with Republican Senators and their Administrative Assistants for the purpose of selecting candidates for appointment. Kleindienst thus continued in official contact with petitioner due to the need for agreement upon such appointments, as well as concerning other Justice Department matters. In addition, they would meet socially (Tr. 1148-56).

3. *Edward (Eddie) Adams*—Adams was named as a co-defendant in the instant case. Prior to trial, he entered a plea of guilty to Count 2 of the indictment (travel in interstate commerce). Following the trial, he was sentenced to a three month term of unsupervised probation and was fined $5,000 (2a, fn. 1). He was not, therefore, a party to the trial, and he did not testify. At the time of the events of this case, Adams was an eighty year old New Yorker who supposedly had substantial political connections, particularly in Washington (2a, fn. 1; 3a).

During the spring of 1970, one Irving W. Swanson requested Adams to solicit political contributions for the re-election of Senator Fong. In the late summer of 1970, Adams came up with such a contribution, in the form of a check, and requested the opportunity to personally deliver it to a member of the Senator's staff. It was in this way that, shortly before the events of this case, Adams and petitioner first met. The check, made out to "cash", had been drawn on a corporate account, and was represented by Adams to be a contribution from one Robert Brinsmade. After Adams left, petitioner realized that it was a corporate check which may not be given as a political campaign contribution, so he voided it and had it returned to Adams. Adams said he would try to replace the check with cash. Swanson testified to these facts as a witness for the defense (Tr. 1291-1305; Defendant's Exhibit U in Evidence; Tr. 1356, 1365).

On November 6, 1970, the signatory on the check, Brinsmade, sent a telegram to Senator Fong, congratulating him on his re-election, and advising that he intended to visit with Fong on his next trip to Washington (Defendant's Exhibit W in evidence, Tr. 1370-71).

As will appear, an important element of the prosecution's case was that petitioner later accepted from Adams an envelope which contained $2,500 in cash, allegedly representing "front money" for the bribery attempt. It was the contention of the defense that the money in question was reasonably understood by petitioner to be Dr. Brinsmade's substituted contribution for the corporate check. This was particularly so since, on the morning of the day that the money was paid, Adams called petitioner and told him that he would see him later in the day with the Brinsmade money (Tr. 1365).

4. *Michael Hellerman*—Hellerman is now known to have been a prolific stock swindler who turned agent provocateur to save himself from his misdeeds. While apparently the prime mover (2a, 3a, 5a) in the alleged plot in this case, he was in fact working with the government and knowingly introduced an undercover FBI agent into these events. Although Hellerman was intricately involved, and the alleged plot was supposed to be primarily for his benefit, he was not indicted and the government did not call him as a witness.

5. *Joseph Bald*—Bald was named as a co-defendant. Prior to trial, he entered a plea of guilty to count 1 (conspiracy) and he thereafter testified as a government witness. Following the trial, he was sentenced to a term of two years imprisonment, twenty months of which were suspended (2a, fn. 1).

Bald is an interior decorator whose problems developed when he was induced into illicit stock transactions by Michael Hellerman. His relationship with Hellerman was

well described by the prosecutor at the time of Bald's sentence:

> ". . . I would say to your Honor that the evidence we have has led us to believe that Mr. Bald is decidedly a follower in all these situations, was led into each of these situations—stock fraud situations—by Mr. Hellerman, and that it was in an effort to extricate himself from these situations that he fell into this situation and it is not the type of situation in which he was the prime motivating force or the most evil of the individuals who participated" (A. 252-253).

6. *Harold Blond*—Blond is a university fund raiser and the brother-in-law of Bald. He was named as a co-conspirator, but not as a defendant. He testified as a witness for the Government.

In September, 1970, Hellerman advised Bald that they were both under investigation by the Securities and Exchange Commission and by the United States Attorney's Office for the Southern District of New York in connection with certain stock transactions (2a). Before this predicament arose, Bald had mentioned to Hellerman that his brother-in-law, Blond, was a friend of a person who held a great deal of influence in Washington—Eddie Adams. With this recollection, Hellerman told Bald to set up a meeting with Adams for the purpose of finding some way to terminate the investigation (2a-3a; Tr. 545-548; 583, 596, 601, 604, 1032-3).

In early November, the meeting was held at Blond's office. Bald, Adams and Blond were present. Adams agreed to help terminate the investigation, but said that it would cost a large sum of money and wondered whether Hellerman could afford it. Bald responded that Hellerman could pay anywhere from $50,000 to $100,000 (Tr. 340; 1034-1033).

Adams indicated that he would set up an appointment for Bald and Hellerman to meet with the petitioner, who he identified as being the Administrative Assistant to Senator Fong. He further said that $100,000 would have to be held in escrow and that it would be going to Senator Fong and to individuals in the Justice Department. In the interim, there would have to be $2,500 to $5,000 advanced as "seed money" for the petitioner (Tr. 550; 1034-1035).

After the meeting, Bald reported this information to Hellerman, who told him that it was too early to pay "front money" (Tr. 551).

A day or so later, Adams called Blond and told him that the appointment was set (Tr. 1036). A day before going to Washington, Bald and Adams met. Bald testified that at this second meeting with Adams, Adams told him not to mention money to the petitioner (Tr. 554). This testimony is particularly significant in view of the petitioner's defense at trial, i.e., that he had no knowledge of a bribe.

D. The Meeting of November 16, 1970

On November 16, 1970, Bald and Hellerman met with the Petitioner at the office of Senator Fong in the New Senate Office Building. Hellerman allegedly told the petitioner of the investigations, that indictments were expected shortly, and that if the petitioner could quash all the SEC matters, "we will pay you $1,000,000." Petitioner allegedly inquired about the identity of the prosecutor who was involved and whether the indictments could be delayed. Hellerman responded that the prosecutor's name was Morvillo and that delay was unlikely (3a, Tr. 555-558).

As it turned out, the anticipated indictment was filed against Hellerman, Bald and 15 other defendants on November 19, 1970 (3a).

E. The Petitioner's Meeting With Kleindienst—November 24, 1970

On November 24, 1970, petitioner met with Kleindienst at the latter's office in the Department of Justice. Kleindienst's version of what occurred, as given at trial, was as follows:

> "Well, after we had exchanged pleasantries, Mr. Carson sat down in a chair in front of my desk and said that he had a friend in New York who was in trouble, and that I could help him with respect to his trouble, his friend was a man of substantial means and would be willing to make a substantial contribution of between $50,000 and $100,000 to the re-election of President Nixon.
>
> "I asked him what kind of trouble this man had. Mr. Carson said that he was under indictment for federal offenses, and I said that under no circumstances could I do anything about the matter, even look into it, as a result of the fact that a Grand Jury had returned an indictment.
>
> "That was just about all the conversation that existed.
>
> "We immediately thereafter—we turned the subject matter to other matters [which Kleindienst thereafter testified concerned a judicial appointment from the State of Hawaii]" (Tr. 1143-1144; 1167).

At most, according to Kleindienst, the total conversation lasted fifteen minutes (Tr. 1165) and that part which concerned the New York indictments was not more than a minute or two (Tr. 1167).*

Petitioner testified that his meeting with Kleindienst resulted from a controversy that had developed concerning

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* At trial, Kleindienst testified that he did not get the impression that he had been offered a bribe (Tr. 1171, 1174-76; See pp. 29-33, *infra*).

the fact that no one from Hawaii sat on the United States Court of Appeals for the Ninth Circuit and an opening had recently occurred which made such an appointment possible. On the very day that petitioner went to see Kleindienst, a letter had been received at Senator Fong's office from the Attorney General of the United States, acknowledging the Senator's recommendation for the vacancy, and this was what had occasioned the meeting (Defendant's Exhibit K in evidence, Tr. 1163,1379). While there, he mentioned the Hellerman meeting as follows:

> "I said to Mr. Kleindienst that a couple of men had talked to me about a problem they had, and that they were willing to make a contribution to the Republican party in the amount of $50,000 or so.
>
> "Subsequent to their talking to me, I saw in the papers where there was an SEC indictment. I told him that I had said to these people that there was nothing that I could do in the matter and I was just relating it to him for his confirmation.
>
> * * * * *
>
> "He said, 'you're right, Bob; there is nothing you can do for anyone under indictment'" (Tr. 1383-1384).

F. The Meeting of November 29, 1970—Entry of the Undercover FBI Agent

During the period of time since the meeting of November 16th, Hellerman met with Bald about three or four times a week, pressing for a revival of the plans to quash the prosecution (Tr. 561). He told Bald that he had someone who would furnish the large sum necessary to fix the case, but that he wanted that person to meet Adams. A meeting was eventually arranged for November 29, 1970 at LaGuardia Airport.

On November 29th, Agent Paul Brana of the Federal Bureau of Investigation was advised for the first time that

he was to be involved in an undercover investigation of this case. On that day, he met with Assistant United States Attorney Morvillo and Michael Hellerman*—the man who pressured Bald to seek influence in Washington (Tr. 776).

It is of particular significance that Brana's recollection is that Hellerman may have told him on that day that petitioner had previously said there was nothing he could do for either Hellerman or Bald (Tr. 784).

Brana then accompanied Hellerman to the airport, where they met Bald and Blond. Brana was introduced as the "friend" of Hellerman, under the name of Paul Bicera (Tr. 565, 627).

Blond told them that an attempt had been made to prevent the indictment through the petitioner, and that the petitioner had said that nothing could be done if there was an indictment (Tr. 628-638).

Brana told the group that he could come up with as much as $200,000 but that he "was still skeptical as to whether or not Mr. Carson could deliver." By this time, Adams had joined the group at the airport and, according to Brana, he claimed that both Senator Fong and Attorney General Mitchell had given their hand shakes on the matter and made assurances that petitioner could deliver. Brana pressed his skepticism and Adams said that he would set up an appointment so that Brana could personally speak to the petitioner (Tr. 636).

G. The Meeting of December 1, 1970

On December 1, 1970, Brana (with three concealed microphones strapped across his chest), Adams and Blond

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* The record is silent as to when Hellerman first started working with the Government. The only persons who could answer that question were Hellerman—who did not testify—and Morvillo —who prosecuted this case.

flew to Washington (Tr. 637-639). This trip was charged as Count 2 of the indictment (interstate travel), upon which petitioner was acquitted.

When they arrived at the Senate Office Building, Adams instructed Brana and Bald to wait outside for fifteen minutes and then to proceed to the office of Senator Fong. Adams, himself, entered the building immediately. When they arrived at Senator Fong's office, Brana was introduced to petitioner as Paul Bicera (Tr. 639-641).

Blond recalls that during the brief conversation that ensued, all of the parties remained standing (Tr. 1064-1065).*

During the course of the conversation, the recording devices which Brana had secreted on his person were operating. Government Exhibit 4 in evidence (A. 291-294) is a transcript of the audible portions of the resulting tape recording. The uncontested audible portions of the tape make four things clear:

1. Mr. Carson categorically said ". . . we cannot do anything to get them off" (A. 291);

2. He also said: "the only thing that we might be able to do and I stress the word might (inaudible) is to give some leniency later on" (A. 291);

3. Brana, in an aside to Adams, made clear that he understood what Carson had said: e.g., "You know, he just said he doesn't want to touch it" (A. 292);

4. Carson attempted to discourage the others from pursuing their efforts: ". . . my advice right now is don't waste your energy and your money.

* This is particularly significant in view of the defendant's testimony that his main thought was to get these people out of his office as quickly and diplomatically as possible (Tr. 1390, 1449, 1460, 1469).

save them for the possibility that sometime you might be doing some good with it. I don't care who you go to now" (A. 293).

After the three visitors had left Carson's office, and were out of Carson's presence, Adams revived the question of "seed money." This was the first time that the matter was mentioned during the day, and it had never been mentioned in Carson's presence according to the testimony of Brana, Bald and Blond (Tr. 644-646). Adams became "very perturbed" when Brana told him that he didn't have $2,000 in seed money with him (Tr. 644).

H. The Meeting of December 29, 1970

After further discussions among Hellerman, Brana, Bald and Adams concerning the possibility of additional indictments, they agreed that $2,500 would be advanced as to petitioner and that a $100,000 contribution would be made to President Nixon's next election campaign, depending upon what could be done (Tr. 648-652).

On December 29, 1970, Brana went from New York to Washington, where he met Adams. Brana was again equipped with electronic surveillance equipment,* and he brought with him $2,500 in cash.

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* An examination of the subsequent recordings reveals that: 1) they are permeated with inaudibility, particularly at those points which are crucial to an accurate interpretation of conversations; and 2) it is clear that Brana realizes the end is coming and attempts to load the tapes with extended self-serving declarations.

Petitioner requested that the Court of Appeals listen to the three tape recordings which were introduced into evidence over the objection of the defense. It is his contention that these recordings were so defective as to be prejudicially misleading to the defense. The problem was compounded by the fact that the jury was given transcripts of the recordings which deprived them of the opportunity to fairly come up with their own impressions as to the contents of the tapes. The Court of Appeals does not appear to have honored petitioner's request.

Adams insisted that the money be given to him, and that, additionally, he be given $200.00 in expenses. Upon Adams' promise that he would give the money to petitioner in front of Brana, Brana turned it over to Adams (Tr. 655).

They then departed for petitioner's office. Shortly after they met petitioner, Adams placed an envelope containing the $2,500 on petitioner's desk (Tr. 655-656). The payment of this money fits in perfectly with the chronology of the replacement of the Brinsmade check, discussed *supra*, at p. 7. Moreover, petitioner testified, without contradiction, that Adams obtained the appointment by calling earlier in the day and claiming that he would drop in with Brinsmade and the replacement. This is verified by the defendant's comments on the tape (A. 318).

Brana then immediately went into an explanation of why they had come down to see Carson, implying that he was interested in seeing future indictments quashed. Carson's reply to this was: "I can't really can't, I really can't." He then switched the conversation to a picture that was hanging on the wall (Tr. 307-308).

During the course of the subsequent conversation, Brana found it necessary to refresh Carson's recollection as to the names of Hellerman and Bald who had been down to see him more than a month before (A. 308; see also 309-310).

The petitioner contends that the audible portions of the remainder of the tape establish (and the inaudible portions would confirm) that: 1) he was diplomatically attempting to discourage Brana from the impression that anything could be done; and 2) he refused to be drawn into a discussion about money, except to the degree of making generalized statements which had the effect of appearing to postpone the discussion so as to avoid a confrontation. We respect-

fully urge that a hearing of the tapes, to the degree they are audible, will support this assertion.

In support of his defense that he truly believed the $2,500 to be the replacement for the Brinsmade check, the defendant established that it was treated as such and placed in the Senator's safe. It was produced at trial.

I. The Perjury Charge

At 11:00 P.M. on December 30 1970, the petitioner was served at his home with a subpoena which had been prepared by the prosecutor, Mr. Morvillo (Tr. 1404). The subpoena directed him to appear before a Grand Jury in the Southern District of New York, "to testify and give evidence in regard to an alleged violation of Section Title 18, United States Code" (sic.). It is to be noted that the subpoena gave no indication whatsoever of the section of 18 United States Code involved (Defendant's Exhibit Y in Evidence, Tr. 1404; A338).

As directed, the petitioner appeared at the office of Assistant United States Attorney Baer who took him to the grand jury room. He was there questioned by Mr. Morvillo in the presence of the Grand Jury and Mr. Baer (Tr. 1406; A. 321). It was when he was before the Grand Jury that he learned for the first time that he was a target of the investigation (Tr. 1407) and he was given a broad description of the charges under investigation, without reference to the persons or incidents involved (A. 321-322). He was also advised of his right against self-incrimination, his right to counsel, and that a deliberate lie would subject him to a perjury prosecution (A. 322-323).

After responding to questions concerning his address and the nature of his employment (A. 323-325), he was asked to identify various individuals. Those questions and answers which form the subject matter of the Perjury count are as follows:

"Q. Do you know an individual by the name of Joseph Bald?*. A. His name doesn't come to my mind.

"Q. To the best of your recollection, have you ever met Mr. Joseph Bald before? A. I don't recall.

* * * * *

"Q. Do you know an individual by the name of Paul Bicera, Bicera? A. I don't recall any such name.

"Q. To the best of your recollection have you ever heard the name Paul Bicera mentioned beore? A. Isn't that the name you just said?

"Q. Yes. A. No, I don't recall the name.

"Mr. Morvillo: May I have this marked Grand Jury Exhibit I for identification, please.

"(Photograph marked Grand Jury Exhibit I as of this date).**

"Q. Mr. Carson, I show you what has been marked Grand Jury Exhibit No. I for identification which for the record is a photograph of a male individual.

"Have you ever seen the person depicted therein before to the best of your recollection? A. I don't recall the face.

"Q. Do you know an individual by the name of Edward Adams?*** A. I can't recall the name.

"Q. That name does not ring a bell to you? A. Not specifically" (A. 15-16, 325-327).

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*Petitioner had met Bald on one occasion, in mid-November (Tr. 555).

** The photograph appears to have been one of only the shoulders and head (Tr. 1410).

*** It appears that Adams was universally known as "Eddie" Adams rather than "Edward" Adams. Thus, immediately after the Grand Jury appearance, the petitioner explained to the prosecutor, "I had always thought of him and had my mind not on Mr. Edward Adams but Eddie—Eddie Adams, we called him, and so I stated" (Tr. 1412).

It was only after the above question that the prosecutor placed his inquiries within a factual context which was calculated to have any meaning for the petitioner. He did this by asking about the defendant's acquaintance with Richard Kleindienst, the Deputy Attorney General of the United States. With the cat out of the bag, the prosecutor did not choose to return to the questions which had been met with a lack of recollection.

The petitioner acknowledged his acquaintance with Kleindienst, but invoked Senatorial privilege when asked "generally what you have occasion to discuss with Mr. Kleindienst in terms of official business" (A. 328). A reading of the Grand Jury minutes makes clear that, once the defendant recognized the nature of the inquiry, he first sought to claim the less stigmatized right of Senatorial privilege, and then made an unheeded request to consult with an attorney; finally, he invoked his right against self-incrimination (A. 328-331). Unrelenting, the prosecutor persisted in his questioning until it became clear that the defendant had gained his wits about him and would not testify without legal guidance.

It was during the course of the last described series of questions that the petitioner, we submit (see: Argument, *infra*, pp. —), purged himself of the appearance of perjury. Although not specifically returning to the question of whether the defendant knew the various individuals involved, the prosecutor asked:

> "Q. Calling your attention again to the day following your conversation with Mr. Kleindienst, did you have occasion to meet with Mr. Edward Adams and Mr. Paul Bicera and Mr. Walter Blond in your office in the Senate Office Building to discuss the possibility of fixing a criminal case here in the Southern District of New York? A. I decline to answer that.

"Q. On what grounds? A. Well, on the—on the grounds that I cannot discuss activities without complete resolution of the Senate.

"Q. Does it come within the scope of your official duties to discuss the fixing of criminal cases? Is that some official function that you serve for United States Senator Fong? A. I decline to answer.

"Q. On what grounds? A. On the grounds that it might tend to incriminate me.

"Q. Mr. Carson, did you ever receive any money from Edward Adams? A. I decline to answer on the same grounds.

"Q. On what grounds is that? A. Well, any of the ones——

"Q. That it might tend to incriminate? A. Any of the ones you set forth there. I'd like to discuss it with an attorney" (A. 330-441).

Significantly, before the petitioner was permitted to leave the Grand Jury room, the prosecutor directed him to wait outside the room (A. 332).

The reason for the latter request soon became apparent. Mr. Morvillo immediately joined the petitioner and brought him to his office, where, despite the desire to consult with counsel, that had been expressed in the Grand Jury room, the prosecutor continued questioning the petitioner and revealed to him the undercover role of Brana, the existence of the tapes and sundry other evidentiary items and claims of the prosecution (Tr. 1410-1413). This prompted the defendant to acknowledge that he recalled meeting the persons in question (Tr. 1412-1413). At or about the same time, the petitioner saw Agent Brana walking outside of Mr. Morvillo's office. He immediately went up to Brana, spoke with him and pointed him out as being the person who had come to his office (Tr. 1413-1414).

Notwithstanding the petitioner's recollections (or, as the prosecution would have it, admissions), the prosecutor did not bring him right back to the Grand Jury room.

It was thus that the indictment was bolstered by a charge of perjury.

Reasons for Granting the Writ

This case raises important questions under the Constitution and Laws of the United States. Moreover, in its opinion, the Court of Appeals noted that its decision "has certain precedental value concerning interrelationships of influence between Congress and the Executive" (2a).

I.

The Court of Appeals has overreached the intendment and literal meaning of 18 U.S.C. 201 in applying its prohibitions to the conduct of the petitioner. Additionally, the Court's decision has made a wide range of common Congressional activity subject to prosecution.

The conspiracy count of the indictment charged that the defendant conspired (18 U.S.C. § 371) with Adams, Bald and Blond to cause travel in interstate commerce (18 U.S.C. § 1952) for the purpose of committing bribery (18 U.S.C. § 201). It is clear that, without the bribery objective, the conspiracy charge could not be sustained.

Concededly, the jury in the present case was permitted to, and probably did, convict the petitioner upon the theory that, pursuant to the conspiracy, he was to be the recipient of a bribe, ". . . in return for exerting his own influence for the illegal purposes" (16a). The Court of Appeals properly held that the propriety of such ". . . a conviction . . . Under § 201(c)(1) or (3) would necessitate a clear understanding on the part of the jury of the meaning of "official act" [(1)] and "act in violation of his official duty"[(3)] (16a)."

Subsections (c)(1) & (3) of the statute provide as follows:

"(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

* * * * *

(3) being induced to do so or omit to do any act in violation of his official duty; or . . . ."

The statute's reach is, however, limited by the definition of "official act," contained in subsection (a):

"(a) For the purpose of this section:

* * * * *

"official act means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit."

In its charge to the jury, the Trial Court did not read the definition of or otherwise define "official act" as found in § 201(a)(11a). Indeed, the Court's charge essentially read the "official act" definition out of the statute when it applied the law to the facts of the case:

"In other words, the crime may be established or completed even if the bribe is not successful. It is sufficient on this one aspect of the problem if the paying or offering party intends that the official should be influenced *in some way*, or if the official seeks or takes or offers to accept or take money or property with the understanding or contemplation that he is to be influenced" (A. 49-50).

* * * * *

"In addition, in understanding the specific nature of the conspiracy charged in this case, remember what I have told you about the definition of the federal crime of bribery, the scope of the meaning of the term, 'public official,' and that the term, to be concrete in terms of this case, extends to officers or employees in either the executive, which includes the Department of Justice—or the legislative, which is primarily the Congress and the people working for members of the Congress; it includes employees or officials in both those branches of government.

* * * * *

"In this connection, I instruct you that if you find that a purpose of the conspiracy *was to influence either Mr. Robert Carson, as Senator Fong's administrative assistant,* or Mr. Kleindienst as Deputy Attorney General, or any other official of the Department of Justice *to do anything to discontinue or attempt to quash or in any way cause the suspension of a prosecution of a case pending here in the Southern District of New York, and it was the intention to do that either by offering or giving money to Carson* or by Carson's taking of money to give to anyone else, or to use as a political contribution, then you would be permitted to find that this element of the conspiracy, its relation to and purpose to promote or to facilitate or attempt to promote or facilitate the activity of bribery may be found to have been established by the evidence before you" (A. 56-58). (Emphasis added.)

At the termination of the main charge, the defense took exception to the manner in which the Court had paraphrased the requirements of Section 201. However, the exception did not specifically indicate the erroneous omission of the charge to define the term "official act" (A. 110-111).

After more than thirteen hours of deliberation, the Court's omission was revealed to be a source of confusion to the jury. There is set forth in the Court of Appeals' opinion, at pp. 12a-14a, fn. 8, the extended series of questions propounded by the jury to the Court. In response, the Court's supplemental charge to the jury provided them with the statutory definition of "official act," and stated, *inter alia*: "

> "Now, your next question is No. 4:
>
> "Is the public official's factual ability to influence a public act relevant to the charge? That is, if an official agreed to accept something of value to influence an act over which he had no influence, would that constitute bribery?
>
> "The answer would run this way: It is not necessary to find that the action or result sought by whoever hypothetically gives the bribe is something that was in fact within the power of the official in question. It would not be possible, on the other hand, for you to find a case of bribery if the action sought was so far outside the purview of the *official's duties as possible power* [*] or possible authority that it would be unreasonable for any reasonable man to have supposed he could have done anything about that particular subject.
>
> "Now, I think you could think of hypotheticals for yourself on that, and I think at this point I would like to leave you with that kind of situation, taking an absolutely extreme example: I imagine if an

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* This represented a continuance of the Court's inclination to disregard the "official act" requirement of the statute. The Court should have charged: ". . . if the action sought was so far outside the purview of the official's *official* duties or possible *official* power . . ." and should have emphasized that the mere fact that one is an official and has *political* or other types of *unofficial*, personal influence does not satisfy the requirement of the bribery statute.

elevator operator in this building took a bribe to influence the judicial conduct, it might well be found that that was so patently outside the purview of his likely or possible authority that it could not be reasonably supposed that he was given that money to influence an official act.* On the other hand, if in the case I put, another hypothetical case, an official with some seeming status or authority in a contracting agency took some money to influence who would get the contract, and if from factual and legal research you found this person really had no power to determine who would get that contract, you might still find the crime of bribery committed in the giving or the receiving. The fact that the giver may have mistaken the extent of the person's authority or power would not in itself be sufficient to avoid the finding of bribery if all the elements of that statute are made out. That is, the giving is with the intent to influence an official act and the taking is with the understanding that that is the purpose of that receipt." **

Finally, the Court reached the jurors' questions concerning the propriety of a (b) "third party" or (c) "gov-

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* This example did not cure the problem because it merely dealt with the obvious unlikelihood that an elevator operator would have sufficient influence over the person who is charged with making the decision sought to be influenced. By prefacing his conclusion with the qualifying phrase, "it might well be found", the Court left open the possibility that an elevator operator could be the *recipient* of a Section 201 bribe if he possessed an actual power of suggestion over a Judge, although the operator, himself was not, as part of *his* official duties, engaged in any aspect of the judicial process.

** Likewise, this example has no bearing upon the facts of this case and could give no proper guidance to the jury. The defendant had no apparent *official* power over the questions of whether cases would be prosecuted or leniency could be given. In regard to these functions, he had no greater actual or apparent status than an influential layman.

ernment official" going to a "judge", or "Justice Department" or the "Attorney for the defense", for the purpose of bringing "forth pertinent information which may influence the weight of a sentence." He responded with the following example, which shed no accurate light upon the official acts of a congressional assistant:

> "If somebody were to give money to a prosecutor to go to a judge with the purpose of influencing the judge in his sentence one way or another, and it was understood that that was the purpose and the giving was corrupt in that sense, then the giving of that money would be a bribe. And I think that is substantially the answer to your question" (A. 216).

Within three hours, including the luncheon hour, after the court concluded its supplemental charge, the jury returned its verdict (A. 221).

It is clear that the jury was left with no realistic guidance as to the most crucial aspect of the conspiracy count. The judge had omitted the definition of "official act" from his main charge, ano actually misdirected the jury as to whether the defendant could properly be the *subject* of a bribe as to the results sought by the alleged conspiracy. There can be no doubt that this is what the jury sought guidance upon in its questions, and no guidance was given to them. The one reading of the definition in the supplemental charge was lost amid a series of inappropriate and misleading examples. We submit that the only theory upon which the defendant could correctly have been convicted, if supported by the credible facts, was that he conspired to offer a bribe to Kleindienst for the purpose of terminating the prosecution. The Court's charge and supplemental charge permitted the jury to convict if they believed that the defendant had *taken* a bribe to use his *personal* (as opposed to "official") influence in regard to trying to get others to terminate the prosecution or to later seek to ex-

ercise his *personal* influence for the purpose of securing a lenient sentence.

The decisional law is clear that there is a bribe under this statute only if the recipient is a public official who is officially empowered, or, at least appears to be officially empowered to make or participate in the act or decision sought to be influenced. *United States* v. *Birdsall*, 233 U.S. 223 (1914). Thus, an interpreter employed by the Treasury Department, who offered his services to translate documents to be offered in a United States Court, has been held not to have been performing an Official Act during the latter service for the purpose of this statute, *In Re Wong Sing*, 83 F. 145 (N.D. Wash., 1897); an internal revenue agent who takes a bribe to burn down a still has been held not to be within the range of his official acts, *United States* v. *Gibson*, 47 F. 883 (N.D. Ill., 1891); an officer who does not have the official authority to give or recommend a priority or advantage sought, is, likewise, outside the purview of the statute, *United States* v. *Stabler*, 169 F.2d 991 (6th Cir., 1948). In short, there must be some direct nexus between the end sought and the official duties of the recipient of the bribe. If his position vis-a-vis the objective is no different than that of anyone who does not hold his position then no indictment can be sustained under 18 U.S.C. § 201.

The authorities cited by the Court of Appeals do not weaken our assertions in this regard (see opinion at 17a-18a). In each instance, the official involved had real or apparent decisional authority or was an *official participant* in the process leading to the decision or had lawful custody of information which he unlawfully sold. While some cases involving *military* officers appear to depart to some degree from the general rule, e.g. *Wilson* v. *United States*, 230 F.2d 521 (4th Cir.), *cert. denied*, 351 U.S. 931 (1956), they are in fact subject to a different rule since, as stated in *Canella* v. *United States*, 157 F.2d 470 (9th Cir. 1946):

> ". . . whenever officers of the United States army take any action whatever in regard to the army their official duties are involved. The United States is entitled to army officers who do not corruptly sell their recommendations to anyone on any subject." 157 F.2d at 481.

Although written within the context of a different statute (18 U.S.C. § 111), making it a crime to assault a federal officer during the performance of his official duties, the following holding applies equally here:

> "The test of a Government agent's conduct is whether he is acting within the scope of what he is employed to do, as distinguished from engaging in a personal frolic of his own." *United States* v. *Cho Po Sun,* 409 F.2d 489, 491 (2d Cir. 1969.)

See also: *United States* v. *Heliczer,* 273 F.2d 241, 245 (2d Cir., 1967).

If the defendant herein actually did offer to receive a bribe in regard to his own conduct, he was engaged in nothing less than "a personal frolic of his own", *United States* v. *Cho Po Sun, supra.* His act was not a violation of 18 U.S.C. § 201.

It is only by tortured reasoning that the Court of Appeals was able to fit the petitioner within the requirements of the statute:

> ". . . [A]ppellant, as an administrative assistant to a member of the Senate Judiciary Committee, clearly is [embraced within the terms of the bribery statute], in a situation in which his influence in connection with federal charges or penalties is sought" (18a).

There is no indication in the record that petitioner or any other Congressional aide ever was involved or purported to be involved, as an aide, in the decision making process concerning the course of criminal prosecutions. It

is bootstrap reasoning to say that the facts of this case establish such a status.

If believed, the prosecution's evidence merely revealed that the petitioner received a sum of money for the purpose of conveying to a member of his political party the offer that a large sum of money would be available as a campaign contribution if the course of a federal prosecution were altered. There was no indication that petitioner was depending upon his position as a Congressional aide to achieve the objective. That was the function of the political contribution. Moreover, the only person petitioner spoke to about the matter was his longstanding political companion and friend—Richard Kleindienst. The petitioner's conversation with Kleindienst was not in terms of a directive, advice or expression of congressional will.

If the petitioner's conviction is sustained upon the rationale advanced by the Court of Appeals, then much activity of Congressmen and their aides is illegal. Aside from the requirement of an official act, the gravamen of the crime under Section 201 requires that the public official:

> ". . . directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, * * * " (18 U.S.C. § 201 [c]).

There is no requirement that the objective sought by the person giving the thing of value be illegal (*United States* v. *Labovitz,* 251 F.2d 393, 395 [3d Cir., 1958]; *Daniels* v. *United States,* 17 F.2d 339, 343 [9th Cir., 1927], *cert. den.,* 274 U.S. 744 [1927]; *Kemler* v. *United States,* 133 F.2d 235, 238 [1st Cir., 1942]). Therefore, that the objective of this alleged conspiracy may have been to "fix" a criminal case, is irrelevant. Thus, if this decision stands, much of the "horsetrading" that goes on on Capitol Hill for purposes, even in part, of securing political support, contributions or "anything of value" in behalf of any "entity" is illegal under this statute. Petitioner submits that it was most unlikely that Congress intended this result to obtain when it enacted Section 201.

II.

Petitioner was deprived of a fair trial when the Deputy Attorney General was called upon to, and did, combine his personal knowledge with unspecified hearsay for the purpose of giving the jury his opinion that petitioner was guilty of the crime charged.

Richard G. Kleindienst, who was Deputy Attorney General of the United States at the time of the events of this case and of the trial herein, testified as a prosecution witness.

Paragraph 3(e) of Count I of the indictment charged that on November 24, 1970, the petitioner approached Kleindienst and stated, "that a $100,000 political contribution would be made if something could be done to stop the prosecution of one of the defendants" in the Hellerman case. The indictment then goes on to state that "the offer was immediately and categorically rejected" (A. 10-11).

The indictment's narration of this incident, particularly the gratuitous reference to an alleged rejection, left no other interpretation than that both parties to the conversation understood a bribe to have been offered. This claim is to be contrasted with Kleindienst's testimony as to the substance of the conversation, *supra,* p. 10.

Kleindienst then testified that one week later he reported the substance of the above conversation to the Attorney General of the United States. The prosecutor attempted to have Kleindienst explain why he reported it to the Attorney General of the United States, but a defense objection to that line of questioning was sustained (Tr. 1144-1145).

On cross-examination, Kleindienst said that the total conversation had a duration of fifteen minutes or less (Tr. 1165), and that the portion relating to the New York case was less than a minute or two (Tr. 1167). Thereafter, the

only communication of any kind that he had with petitioner was a telephone conversation, the sole subject matter of which was a judicial appointment (Tr. 1172-1174).

On December 1, 1970, Kleindienst was shown a memorandum which had reference to petitioner, and which was addressed to the Attorney General from the Director of the F.B.I. (Tr. 1169). This was the reason that he hurriedly made a report to the Attorney General (Tr. 1168-1170).

During the period from November 24 until seeing the F.B.I. memorandum on December 1, Kleindienst had given no further thought to his conversation with petitioner (Tr. 1171). Defense counsel elicited the following from Kleindienst concerning the nature of his conversation with petitioner:

> "Q. It is true, then, is it not, that on November 24, 1970, you did not regard that in the conversation you had with Mr. Carson that he offered you a bribe? A. *No, I did not.*
>
> "Q. If you had regarded that conversation as containing a bribe offer, you would have immediately reported it, would you not? A. Yes, sir, I would have.
>
> "Q. And you would have initiated the appropriate action to deal with it, isn't that true? A. Well, I would have reported it and taken that action that the circumstances warranted.
>
> * * * * *
>
> "Q. And it was not until after that [seeing the FBI communication] that you did or said or wrote anything with respect to the conversation of November 24th? A. Within minutes after I saw that, and at 10:00 I prepared the memorandum with Mr. Peters on that day, that is correct" (Tr. 1174-1176). [Emphasis added.]

On redirect examination, the Court sustained a defense objection to the prosecutor's attempts to elicit from Kleindienst the nature of the information which he learned on December 1st and which prompted the writing of his memorandum concerning his conversation with petitioner (Tr.

1177-1178). When the prosecutor pressed his desire to probe Kleindienst's state of mind as of December 1, the following occurred:

> "The Court: Well, I think there is enough of that, *but I think that the possibility of getting in hearsay that goes to the merits of the case outweighs the need to express that and I sustained the objection.*"

By Mr. Morvillo:

> "Q. *After learning what you learned on December 1, 1970, with regard to the fact that there was an investigation involving Mr. Carson, did you then consider what had happened on November 24th to have been a bribe offer? A. Yes.*
>
> *"Mr. Morvillo: No further questions"* (Tr. 1178). [Emphasis added.]

As can be seen, this dramatic conclusion to Kleindienst's testimony on redirect was in direct violation of the Court's ruling.

On recross-examination, Kleindienst confirmed that whatever it was that made him change his mind a week later, it was not the substance of the conversation that he had had with petitioner and it was not any conversation that he had with petitioner during the interim (Tr. 1178-1180).

In his summation, the prosecutor used Kleindienst's conclusion of guilt, based upon hearsay, to its fullest extent, and at length (Tr. 1664-1665).

Petitioner submits that Kleindienst's testimony, based upon an FBI report not in evidence, was prejudicial hearsay, violative of the petitioner's rights of confrontation and cross-examination under the Sixth Amendment. The Court of Appeals appears to give some support to this contention:

> "The question on redirect, unlike that on cross-examination, undoubtedly was prejudicial; furthermore, it called for a statement of opinion based not upon personal observation but upon inadmissible hearsay evidence, *i.e.*, the government memorandum. Hence, the answer elicited was not qualified by

knowledge and was objectionable. *See* 2 J. Wigmore, Evidence § 657, at 762 (3rd ed. 1940)" (22a).

However, the Court appears to find that there was some kind of a waiver due to the failure of petitioner's counsel to object to the particular question:

> "We do not find plain error in this admission, however. The question arose on redirect. It was in rebuttal to a matter probed on cross-examination, seeking to cast doubt on the witness's credibility at trial. It ill behooves the defense to argue prejudice here, having failed to object to the improper question on redirect, when the reach of the cross-examination invited, if not required, explanation by the witness of his failure to recognize in the first instance an approach which the Government now was prosecuting as an attempt to bribe" (22a).

In asserting that a proper objection was not interposed, the Court of Appeals has drawn a meaningless distinction between the immediately preceding questions and the one now claimed to be error. The trial Court had made it clear both on direct examination of Kleindienst and redirect examination that the prosecutor would not be permitted to utilize Kleindienst for the purpose of placing the contents or conclusions of the FBI report before the jury. In view of that fact, no meaningful waiver can be found for counsel's failure to object before the one-word answer, "Yes." The onus of the problem should properly be placed on the prosecutor, who created it.

Kleindienst was a participant in the conversation, he was a friend and political ally of the defendant, and he was the second highest prosecutorial official of the United States. His opinion, based on hearsay, that the petitioner was guilty of the crime charged, was extremely prejudicial and violated petitioner's right to be confronted by his accusers and to exercise his right of cross-examination. *Bruton* v. *United States*, 391 U.S. 123 (1968); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Broonhart* v. *Janis*, 384 U.S. 1 (1966); *Roberts* v. *Russell*, 392 U.S. 293 (1968); *United States* v. *Petrone*, 185 F.2d 334 (2d Cir., 1950).

III.

Petitioner effectively recanted his allegedly false grand jury testimony.

The facts concerning petitioner's grand jury testimony are set forth, *supra*, at pp. 16-19. Petitioner submits that the circumstances under which he invoked Senatorial and Fifth Amendment privilege constituted an effective recantation of any false testimony he may have given moments before. This is particularly so in view of the formal recantation which the petitioner gave to the prosecutor immediately after the grand jury appearance (*supra*, p. 19).

The Court of Appeals rejected our argument as follows:

> "There is no real evidence that appellant testified mistakenly [12] or carelessly, and hence *United States* v. *Norris*, 300 U.S. 564 (1937), stands squarely in his way; moreover, as the Government correctly points out, assertion of the fifth amendment privilege does not by itself imply any fact. *See Grunewald* v. *United States*, 353 U.S. 391, 415-24 (1957)" (23a).

In *United States* v. *Norris*, 300 U.S. 564 (1937), this Court noted the sparcity of authorities on this issue (300 U.S. at 575). *Norris* held that:

> ". . . the plain words of the [perjury] statute and the public policy which called for its enactment alike demand we should hold that the telling of a deliberate lie by a witness completes the crime defined by the law. This is not to say that the correction of an innocent mistake, or the elaboration of an incomplete answer, may not demonstrate that there was no willful intent to swear falsely. We have here no such case" (300 U.S. a 576).

As pointed out in *Fotice* v. *United States*, 137 F.2d 831 (8th Cir., 1943), *Norris* turns upon its own facts:

> "There is nothing in the case of United States v. Norris * * * to require a contrary conclusion. In that case the Supreme Court held that a witness who commits wilful perjury cannot purge himself of the offense by appearing at a later stage of the hearing and confessing that his testimony was false * * *

> "The evidence here bears no resemblance to that in the Norris case. Here the witness, upon being confronted with evidence of the oath which he had testified he did not remember, immediately and freely admitted his error. He did not, as did the defendant in the Norris case, wait until his perjury had been exposed and then return to the stand to confess it and ask to be permitted to tell the truth.* * *" (137 F.2d 842-843).

See also *Conrad* v. *United States*, 225 F.2d 247 (5th Cir., 1958).

We submit that the defendant's claim of privilege concerning his involvement with Bald, "Bicera" and Adams constituted a retraction of his prior answers as to his recollection of these people. The circumstances of his testimony are such as to call for a resolution of this matter in his favor rather than highly technical construction which would permit a finding of guilt. He came to the Grand Jury without any forewarning of the nature of the proceeding or of the statutes whose violation were being investigated. One can well imagine the shock to a man in his position upon learning that he is the target of a bribery and conspiracy prosecution. His exposure to most of the people involved had been brief. His ability to grasp his situation and the appropriate response must reasonably have been impaired. The prosecutor played cat and mouse with him until the damage was done, and only then revealed enough facts for the matter to be placed in perspective.

We do not contend that the statements later made in the prosecutor's office were, in and of themselves, sufficient to purge any falsehood if there was any. However, this later willingness to speak is a factor to be taken into consideration.

We rest our main reliance upon the petitioner's claim of privilege. That claim was made as soon as enough facts were revealed to unequivocally provide a basis for recollection. Can it be that under those circumstances only an inculpatory statement would cure the error? We submit that the claim of privilege was an implicit retraction of the prior responses. Although we have not found any case in

point, the logic of the argument precisely satisfies the policy behind the prohibition of perjury. There is no conceivable way that the Grand Jury could have been led astray by the testimony of this petitioner. His claim of privilege effectively neutralized his prior incorrect testimony, and, if anything, sharpened the Grand Jury's quest.

While it is generally the case that no inference may be drawn from the invocation of the Fifth Amendment privilege, the situation here is thoroughly inapposite to that found in the authorities cited for that proposition. The issue here concerns the state of mind of the witness at the time he was given his testimony. To have required more would have been to impel the petitioner to incriminate himself. He went as far as was necessary under the circumstances.

IV.

The prosecutor's credibility and personality became such central factors that the petitioner was deprived of a fair trial.

(1) Mr. Morvillo was the prosecutor in charge of the very indictment which the alleged conspiracy herein sought to get quashed (Tr. 1465-66). For this to have been accomplished, he would have had to be "reached"; i.e., Morvillo would logically have been the ultimate person to be influenced by the bribe.*

There was thus depicted at the instant trial an outraged public servant wielding the sword of justice against those who contemplated corrupting him. That this was the true posture of the case as it went to the jury is demonstrated by Mr. Morvillo's cross-examination of the petitioner and his summation (Tr. 1445, 1465-1468, 1507-1508, 1653-1656, 1674**, 1683***).

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* We do not suggest that this would have been possible.

** ". . . if *we* were so anxious to put money in Carson's pocket, there was an opportunity on December 1st" (Prosecutor's summation, Tr. 1674).

*** ". . . he lied on January 6th, he lied with regard to everything *we* asked him after he admitted his name" (Prosecutor's summation, Tr. 1683).

Moreover, it was Mr. Morvillo who met with Hellerman and Brana for the purpose of infiltrating the petitioner's office (Tr. 776), who appears to have dictated the subpoena which summoned the petitioner to the grand jury (A. 338), who examined him before the grand jury (A. 320), and who received the post-grand jury admissions of the petitioner (Tr. 1410-1414).

In the midst of trial, both the prosecutor and the Court recognized the danger that Morvillo's involvement in the facts of this case, when combined with the fact that he was the prosecutor, posed to the requirements of a fair trial (Tr. 1526).

(2) Realizing that, by crossing his arms in front of the speakers that were taped to his chest, Brana could, at will, cut off the sound that went to the recording device, defense counsel argued in summation as follows:

> "And in the course of what you can read from the transcript of that recording, made as a matter of convenience, because it becomes quite clear that what is not wanted to be heard becomes inaudible and what is wanted to be heard, I respectfully suggest to you Judges of the fact, you can hear as loud and clear as the loudest bell * * *" (Tr. 1627).

At the commencement of his summation, the prosecution let forth a vitriolic personal blast against defense counsel which was clearly prejudicial to the defendant and which placed the prosecutor squarely in the position of giving his personal opinion of guilt to the jury:

> "In starting my summation, I want to go directly to something that Mr. Brill said that has a great deal of significance with regard to this case. In adverting to Mr. Brana and in adverting to the transcripts and the tape recordings, Mr. Brill said, 'what is not wanted to be heard is inaudible', and suggested to you quite plainly that Brana was deliberately folding his arms and closing out beneficial testimony to Mr. Carson. *I suggest to you, ladies and gentlement of the jury, that such contention is not true, that it is a low and dastardly remark to make, and is not worthy of consideration.*

"[Defense counsel]: Your Honor, I regard this as a matter of personal privilege and I rise on that point.

"The Court: Well, let's leave out things like 'low and dastardly' Mr. Morvillo. You can otherwise argue the adequacy or inadequacy.

"Mr. Morvillo: It is not worthy of any consideration on your part. If you believe for one minute, if you believe for thirty seconds that Mr. Brana deliberately lied, that he deliberately concealed evidence, that he deliberately suppressed evidence *as a representative of the F.B.I. and of the United States,* your duty is to acquit this man regardless of what other piece of evidence came in in this courtroom.

"Mr. Brill: I object to that. I don't think that's true, your Honor.

"The Court: That's argument, and I will allow it.

"Mr. Morvillo: Paul Brana didn't suppress evidence. Those tape recordings speak for themselves. Those transcripts speak for themselves. If you think it is necessary, listen to them again, and read them again, and let's be done with Mr. Brill's red herring" (Tr. 1650-51).

Beyond any doubt, the tape recordings were a central fact in this prosecution. By allegedly filling in the gaps of inaudibility, Brana turned innocuous and explainable statements of petitioner into conspiratorial assertions. The defense was obliged to cast doubt upon the memory and credibility of Brana. The prosecution was obliged to limit itself to a reasoned argument rather than a passionate outcry of personal vindictiveness which placed the stamp of credibility and patriotism upon Brana.

Not content with placing himself in the balance, the prosecutor attempted to draw the Judge in as well. The witness Bald had been the only prosecution witness to testify to the events in petitioner's office which preceded the petitioner's visit to Kleindienst. Realizing the crucial nature of the witness, the prosecutor argued as follows in an attempt to shore up his questionable credibility:

> "Keep one thing in mind. Mr. Bald is through with this case. He pleaded guilty—you heard him say that he pleaded guilty to the conspiracy, to this indictment. The only thing left that can happen to Mr. Bald is that he has to be sentenced. Do you think that man would be crazy enough to come into the very courtroom *presided over by the Judge who was going to sentence him* and compound the crime that he has admitted by perjuring himself again?" (Tr. 1657).

On the other hand, the prosecutor attempted to deprecate the right of a defendant to testify in his own behalf and the presumption of innocence which attaches to any defendant in a criminal case:

> "The defendant, Robert Carson, on the other hand, has every reason in the world to lie. That he has had every reason in the world to lie right from the start of this case, and *that is precisely what he has done.*
>
> "Because, you see, if he fools you he walks out of here a free man, and I submit to you that there is no greater motive to lie in the world than that" (Tr. 1658).

Carrying on with the injection of his own personality into the case, until cut off by an objection by defense counsel, the prosecutor made such comments in his summation as: "I vouch to you people that when you go into that jury room tonight—[objection]"; "the Grand Jury testimony [of Carson] is a tissue of lies" (Tr. 1683); ". . . the fact is that he lied on January 6th, he lied with regard to everything *we* asked him after he admitted his name" (Tr. 1683); "Robert Carson betrayed a public trust, a very sacred public trust, he betrayed that trust in mid-November, on November 23rd, on November 24th, on December 1st, on December 29th, on January 6th, and *yesterday* [in his trial testimony]" (Tr. 1684).

In short, the prosecutor's degree of involvement in the pre-trial development of this case and the nature of his argument to the jury were such as to be violative of the standards of due process. Section 5.8 of the American Bar

Association's Standards Relating to the Prosecution Function (tentative draft, March 19, 1970) provides as follows:

> "Argument to the jury.
>
> "(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> "(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> "(c) The prosecutor should not use arguments calculated to inflame the passions or prejudice of the jury.
>
> "(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused, under the controlling law, or by making predictions of the consequences of the jury's verdict."

See also: *Berger* v. *United States,* 295 U.S. 78 (1935); *Harris* v. *United States,* 402 F.2d 656 (D.C. Cir., 1968) [Per then Circuit Judge Burger]; *Hall* v. *United States,* 419 F.2d 582 (5th Cir., 1969); *Dunn* v. *United States,* 307 F.2d 883 (5th Cir., 1962).

In this trial, the prosecutor violated the above standards. We submit that, in view of his personal involvement, he should not have tried the case; having done so, it was his responsibility to keep his personal beliefs and attitudes as to the guilt or innocence of the petitioner suppressed in the presence of the jury. He failed to do so and turned the prosecution into a contest between himself and the petitioner. For that reason, the proceedings were deprived of objective integrity and the petitioner was denied the due process of law to which he was entitled.

The Court of Appeals did not see fit to answer our arguments in this regard (see opinion at 25a).

CONCLUSION

For all of the above reasons, the petition for a writ o certiorari should be granted.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Petitione

August, 1972

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-208

ROBERT T. CARSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 685—September Term, 1971.

(Argued April 13, 1972 Decided July 7, 1972.)

Docket No. 72-1123

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT T. CARSON,

Defendant-Appellant.

Before:

FRIENDLY, *Chief Judge,*
SMITH and OAKES, *Circuit Judges.*

Appeal from a judgment of conviction following a jury trial in the District Court for the Southern District of New York, Marvin E. Frankel, *Judge,* finding appellant guilty of conspiracy to travel in interstate commerce in furtherance of the unlawful activity of bribery, in violation of 18 U.S.C. § 371, and of perjury before a federal grand jury, in violation of 18 U.S.C. § 1621.

Affirmed.

HENRY J. BOITEL, New York, New York, *for Appellant.*

ROBERT G. MORVILLO, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Joseph Jaffe and Peter F. Rient, Assistant United States Attorneys, on the brief), *for Appellee.*

OAKES, *Circuit Judge:*

Robert T. Carson appeals from his convictions, following a jury trial, for conspiracy to travel in interstate commerce in furtherance of bribery, in violation of 18 U.S.C. § 371, and for perjury before a federal grand jury, in violation of 18 U.S.C. § 1621.[1] While our decision to affirm appellant's convictions turns on the interpretation of technical language of the criminal code, the result obtaining has certain precedential value concerning interrelationships of influence between the Congress and the Executive. Thus we review the pertinent facts of the case with some particularity.

In the fall of 1970, co-defendant Joseph Bald and one Michael Hellerman discovered they were under scrutiny by the Securities and Exchange Commission and the United States Attorney's office for the Southern District of New York in connection with certain stock transactions. At Hellerman's suggestion and with the help of co-conspirator

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1 Carson was sentenced to concurrent terms of imprisonment for 18 months on the conspiracy and perjury counts and was fined $5,000 on the conspiracy count. The jury found Carson not guilty on two counts under 18 U.S.C. § 1952, charging him with traveling in interstate commerce in furtherance of the unlawful activity of bribery.

Two co-defendants, Edward Adams and Joseph Bald (not charged with perjury), pleaded guilty before trial on separate counts. Bald testified for the Government and was later sentenced to imprisonment for two years, 20 months of which were suspended. Adams, an octogenarian, received a suspended sentence with three months' probation and a $5,000 fine.

Harold Blond, Bald in November 1970 met with a New Yorker named Edward "Eddie" Adams, an older gentleman who supposedly carried a lot of political influence in Washington, to attempt to arrange a "fix" on the investigations. Adams was agreeable, but indicated the "fix" would be costly ($50,000-$100,000) and that he, Adams, would need "front" or "seed" money of between $2,000 and $2,500. Bald, however, would not part with seed money until there was assurance that some success to the venture would be in the offing. Adams then said he would try to introduce Bald to appellant Carson, who was the Administrative Assistant to United States Senator Hiram Fong, and he indicated that the big money would go to Senator Fong[2] and "to individuals in the Justice Department."

As a result of Adams' effort, in mid-November Bald and Hellerman met in Washington, at Senator Fong's office and at the Senate cafeteria, with Carson. Hellerman allegedly told Carson of the investigations, that indictments were expected shortly, and that if Carson could "squash" all the SEC matters, "we will pay you $1,000,000." Carson inquired about the identity of the Assistant United States Attorney who was involved and whether the indictments could be delayed. Hellerman told him the name and that delay was unlikely. Indeed, in November 1970 an indictment charging various violations of the federal securities laws was filed in the Southern District of New York [*United States* v. *Dioguardi*, 70 Crim. No. 967 (S.D.N.Y., filed Nov. 19, 1970)] against Hellerman, 15 other defendants and Bald as a co-conspirator. The next day Adams related to Blond that Carson had informed him that he (Carson) was disturbed about the people indicted and, at best, that he could help only Hellerman and Bald.

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2 No suggestion has been made that Senator Fong knew of, or was in any way involved in, any of the events leading to Carson's conviction.

On November 24, 1970, appellant Carson met with (then) Deputy Attorney General Richard Kleindienst at the Department of Justice in Washington. At Carson's trial, Kleindienst testified that the meeting lasted 15 minutes, the first minute or two of which he described as follows:

> Well, after we had exchanged pleasantries, Mr. Carson sat down in a chair in front of my desk and said that he had a friend in New York who was in trouble, and that if I could help him with respect to his trouble, his friend was a man of substantial means and would be willing to make a substantial contribution of between fifty and one hundred thousand dollars to the reelection of President Nixon.
>
> I asked him what kind of trouble this man had. Mr. Carson said that he was under indictment for federal offenses, and I said that under no circumstances could I do anything about the matter, even look into it, as a result of the fact that a grand jury had returned an indictment.
>
> That was just about all the conversation that existed.
>
> We immediately thereafter—we turned the subject matter to other matters [which Kleindienst thereafter testified concerned a judicial appointment from the State of Hawaii]. . . .[3]

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3 Appellant, on the other hand, contended at the trial that the meeting was arranged primarily to discuss the judicial appointment, and gave this testimony concerning his friends' problem:

> I said to Mr. Kleindienst that a couple of men had talked to me about a problem they had, and that they were willing to make a contribution to the Republican party in the amount of $50,000 or so.
>
> Subsequent to their talking to me, I saw in the papers where there was an SEC indictment. I told him that I had said to these

Not long after the filing of the indictment, Hellerman informed Bald that he had someone who would furnish the large sum necessary to fix the case and that he wanted that person to meet Adams. Again through the intercession of Blond, Bald and Adams held a meeting, at which Bald said that Adams should forget about the 15 defendants, helping only Bald and Hellerman, and that he wanted Adams to meet the money man, who would be willing to pay $200,000. Adams again wanted "seed money," but Bald put him off; thereafter, a rendezvous was arranged for November 29, 1970, at LaGuardia Airport, to discuss the fix.

Bald, Blond and Hellerman arrived at the airport before Adams did, and Hellerman, now aiding the Government, brought with him FBI Special Agent Paul Brana, whom he introduced to the others as Paul Bicera, the sponsor of the fix. Brana pretended skepticism of Adams' influence, which Blond offset with name-dropping and a tale of Adams' political influence record in Washington. Blond also told Brana that Senator Fong was a member of the Judiciary Committee and could handle the matter; that at the first meeting of Carson, Bald and Hellerman, Hellerman was mistaken in mentioning $1 million; and that a fix on the pending indictment and any future indictments would cost $200,000.

Adams then joined the other four at the airport and explained to Brana that he knew all about the case, that Carson had not had time to act on the first indictment, that Senator Fong was indeed influential as a member of the Judiciary Committee and that both Senator Fong and Attorney General Mitchell had given their handshakes on

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people that there was nothing that I could do in the matter and I was just relating it to him for his confirmation.

* * * * *

He said, "You're right, Bob; there is nothing you can do for anyone under indictment."

the matter. Brana again portrayed skepticism, and Adams said he would set up a meeting between Carson and Brana so the latter could be personally persuaded.

On December 1, 1970, Blond, Adams and Brana, who was wearing a recording device, flew from New York to Washington and met with Carson in Senator Fong's office. Following introductions, Carson stated that he had previously been told that "he [apparently Hellerman] had a means in which he could hold off the prosecutor" on the indictment. Had they been successful, he added, "we might have been able to do something. The next day it hit the papers and for us to ask for the case from New York after it hit the papers then all of the newspapers would wonder why."

The tape from the recording device on Brana's person then revealed a conversation between Brana and Carson, in which Carson convinced Brana that nothing could be done about the matter because of the involvement of the other defendants and of the Assistant United States Attorney, which made the case "too hot." In the following taped discussion, Carson alluded to possible future leniency and to his earlier talk with the Deputy Attorney General:

Brana: In other words it's a dead issue. Is that what you are saying in fact?

Carson: Later on we might be able to do something for these two.

Brana: But as far as the two fellows we are interested in there is no chance to get it squashed.

Carson: No, and that's from the top man.

Brana: That's from the top man? Okay, what more can we say. We tried and we appreciate your efforts.

. . . .

Carson: . . . [I]f he feels that he wants me to make inquiries, my advice right now is don't waste your energy and your money, save them for the possibility that sometime you might be doing some good with it. I don't care who you go to now.

After the meeting Brana told Adams that the $200,000 had not been deposited in a bank as previously arranged. Adams left Blond and Brana, who returned to New York; on the trip Brana first learned that he was supposed to have brought $2,000 to give to Carson.

On December 22, 1970, Bald, Hellerman and Brana met at a New York restaurant. Bald told Brana that he was concerned about the possibility of new indictments and that Brana should make the $200,000 bank deposit in anticipation of another meeting in Washington that Adams was going to arrange. Two days later Brana met with Hellerman and Adams in New York; Adams reported that Carson could take care of the new indictments and that "the new price for the handling of the indictments would be $100,000 and that a schedule could be worked out between Mr. Carson and [Brana] depending upon what Mr. Carson could do for us." Brana then gave Adams $200 expense money that Adams requested of him, and also showed him $2,500, which was to be given to Carson. Arrangements were made for making another appointment with Carson.

On December 29, 1970, Brana, again equipped with a recording device, flew to Washington and met Adams at a hotel. There Adams asked him for another $200 expense money and for the $2,500 for Carson. Brana gave both to Adams after Adams said he would give the $2,500 to Carson in Brana's presence. Upon meeting Carson in Senator Fong's office, Adams immediately handed him the

$2,500 cash. Carson asked, "For the [inaudible on the tape] Senator?"

Carson testified that the $2,500 was a campaign contribution for Senator Fong from one Robert Brinsmade. The cash payment, according to Carson, was made after he [Carson] had earlier returned as improper a corporate check made payable to "Cash," signed by Brinsmade and given to Carson by Adams. Brinsmade was not called to testify at trial.

The defendant contended at the trial that the tape then disclosed Adams' voice saying "Mr. Carson," with Carson replying, "Fine, thank you very much." The Government's version of the same tape, supported by the testimony of Agent Brana, read as follows:

Adams: Mr. Carson, for you sir
Carson: Fine
Adams: For Christmas
Carson: Thank you
Adams: Look
Carson: Very much

Thereafter a discussion ensued in which Brana explained that he was there for the same purpose as before, but that new indictments were expected. He stated that the leniency Carson had discussed at their first meeting would surely be impossible if the men were indicted again. Carson switched the subject for a moment, and then inquired about the status of the new charges, particularly against Bald. Brana stated that Bald thought he was going to be indicted, and said to Carson: "Now Mr. Adams indicated that you could possibly work through, you know, whoever handles those matters, I don't know." Carson replied, "And you don't know and you don't want to know [inaudible on tape]."

Carson then indicated that he was not sure that he could do anything for Brana's friends as the matter might be

"over my head," and in view of the involvement of the "United States Attorney's office up in New York." He stated, however, that he needed to know whether the new indictments had been handed down, and when Brana told him Bald thought they were in preparation, Carson said, "Let me work on that," and, "Well we'll find out what we can do, if we can do anything."

Thereafter the subject turned to money, and the tapes revealed the following conversation:[4]

Brana: a lot of money involved right, we're not talking $10,000 right, we just put 2500 down, we're talking, you know you originally come to me and were talking $200,000 right?

Adams: No, No.

Brana: That was the original figure that was

Adams: Yes

Brana: quoted to me

Adams: No, hundred

Brana: Now its a hundred thousand

Carson: Yes

. . . .

Brana: and this actually what it is an investment. We're putting up front money but ah

Carson: Well I don't want [inaudible] any strings attached

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4 Prior to the discussion of the specific amount of money involved, Brana and Carson had this dialogue:

Brana: All right well let's say that supposing that ah, no you can stop the indictments for 'em. New indictments do come down right. Assuming that they are, that we do find out that they are ready to put them down.

Carson: Yeah, we'll let you know? Ah, ah the way these things work is that if something could be done, somebody will make a suggestion to me that it would be very nice if a contribution would be made to (inaudible).

Brana: Right.

Brana: No, no strings attached whatsoever, the only you know, I mean you're trying to do something for us and uh but you know I'd like to get some idea as to how, uh you know, like supposen that you can handle it, the indictments, the SEC indictments and there's leniency and maybe the guy does six months, I'd like to know what the arrangements would be for payments or what you would expect.

Carson: It will be all spelled out.

Brana: OK. Very good.

The next day, December 30, 1970, Carson was served with a subpoena to appear before a federal grand jury in the Southern District of New York on January 6, 1971. As a witness before the grand jury Carson was told that the investigation concerned potential crimes of conspiracy and bribery of public officials, and was advised of his constitutional rights and that he may be a target of the investigation. In his testimony Carson denied knowing Hellerman, Bald, Adams and Bicera (Agent Brana's undercover name), and, when shown a photograph of Brana, denied recognizing him.

In this court, appellant's principal attack is directed toward the trial court's charge to the jury concerning conspiracy to commit bribery[5] and especially its failure to define clearly the term "official act" as found in the

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5 The conspiracy statute, 18 U.S.C. § 371, reads as follows, in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

bribery statute.[6] In its main charge on the conspriacy count, the court read 18 U.S.C. § 201(b), which applies to the offering or giving of a bribe, and § 201(c) which applies to soliciting or receiving a bribe, but did not read the definition of or otherwise define "official act" as found in § 201(a) and used in § 201(b)(1). The court further instructed the jury that it could find the existence of a conspiracy if it found, *inter alia*, a purpose of the conspiracy was

> to influence either Mr. Robert Carson, as Senator Fong's administrative assistant, or Mr. Kleindienst as Deputy Attorney General, or any other official of the Department of Justice to do anything to discontinue or attempt to quash . . . a prosecution of a

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6 The portions of the bribery statute, 18 U.S.C. § 201, pertinent here, are:

> (a) For the purpose of this section:
>
> "public official" means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government or a juror; and
>
> "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and
>
> "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.
>
> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
>
> (1) to influence any official act; or
>
> (2) to influence such public official or person who has been selected to be a public official to commit or aid in committing,

> case pending . . . in the Southern District of New York, and it was the intention to do that either by offering or giving money to Carson or by Carson's taking of money to give to anyone else, or to use as a political contribution . . . .[7]

After deliberating for approximately 13 hours, the jury sent a note to the trial court requesting, *inter alia*, clarification of the definition of bribery and the role played therein by the term "public" (meaning "official") act.[8] Following a discussion of the jury's questions and his

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> or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or
>
> (c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
>
> (1) being influenced in his performance of any official act; or
>
> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) being induced to do or omit to do any act in violation of his official duty; or . . . .

7 With respect to its instructions on Counts Two and Three, charging the substantive violations of traveling in interstate commerce in furtherance of the bribery under 18 U.S.C. § 1952, the court stated that the crime "applies both to the giving and the receiving, to the offering or the soliciting of money or things of value, and that the giving or offering or soliciting or receiving must be for the purpose of having a public official influenced in his performance of any official act or omission in the course of his duties."

8 The pertinent questions read:

> We would appreciate a selective (underscored) rereading and expansion of the definition of bribery, which we understand in substance to be the giving of something of value to a public official with the intent to influence any public act or the acceptance or

proposed answers with counsel, the court in a supplemental charge read to the jury 18 U.S.C. § 201(b) and the "official act" definition from 18 U.S.C. § 201(a). In response to jury question number 4, note 8 *supra*, which was directed to the scope of the term "official act," the court instructed:

> It is not necessary to find that the action or result sought by whoever hypothetically gives the bribe is something that was in fact within the power of the official in question. It would not be possible, on the other hand, for you to find a case of bribery if the action sought was so far outside the purview of the official's duties or possible power or possible authority

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agreement to accept anything of value to influence a public act by a public official.

If proper, it would be helpful if the expansion covered the following questions:

1. What is a public act as defined in the law?

2. What is the relevance of the legality of the public act, that is, if an official agrees to do something that is completely legal in return for something of value, has he committed bribery?

3. Does the something of value the official receives or agrees to receive have to be for himself? For example, would the acceptance of a political contribution for a political party constitute the acceptance of something of value?

4. Is the public official's factual ability to influence the public act relevant to the charge. That is, if an official agreed to accept something of value to influence, would that constitute bribery?

5. If the legality of the public act is an issue, could you define the legality of the following acts by a public official, such as a congressional administrative assistant:

(a) Attempting to determine from or influence the Justice Department in the timing of handing down an indictment in a criminal investigation.

(b) Inquiring among Justice officials as to either the status of or probable entrance—outcome or probable outcomes of an investigation in progress.

(c) Acts referred to in the questions on leniency following.

As you know, there are several references to the seeking or obtaining of leniency in this trial. A confusion exists in the minds of

that it would be unreasonable for any reasonable man to have supposed he could have done anything about that particular subject.

The court also presented hypothetical situations involving bribery and the conduct of official acts. Shortly after the giving of the supplemental charge, the jury brought in its verdict.

Appellant's principal claim, in summation of all the foregoing, is that he was improperly convicted because the charge permitted the jury to convict if it found solely that a purpose of the conspiracy was to influence Carson, as an Administrative Assistant, by the offer of money to him for the purpose of quashing the prosecution or obtaining leniency. Carson does not deny that on the evidence he properly could have been convicted of conspiring to bribe the Deputy Attorney General to quash the prosecution. He contends, rather, that he may have been convicted for conspiracy to take a bribe to exert his personal

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the jurors as to whether and under what circumstances this seeking of leniency at or prior to the time of sentencing by an individual (third party) not party to a trial is legal and/or illegal. An understanding of the distinction between legal and illegal aspects of the above type of activity has become important to our deliberations. Therefore, we request information and/or instructions from you concerning this.

Among other things, we seek to learn:

(a) Is it legal or illegal for a third party to bring forth pertinent information which may influence the weight of a sentence?

(b) Is it legal or illegal for a third party to attempt to discuss such information with:

1) A judge; 2) The Justice Department; 3) Attorney for the defense?

(c) Is it legal or illegal for a government official to participate in either of the activities described in (a) and (b) above?

Parenthetically, it may be said to those who would do away with the jury system, the acuity of this jury might be pondered.

influence as a congressional aide to achieve the illegal objective. Personal influence, he claims, is not within the scope of the bribery statute, for it is inconsistent with the term "official act." Appellant, therefore, contends that the court should have charged the jury to acquit if the action sought were "so far outside the purview of the official's *official* duties or possible *official* power . . ." and should have emphasized that the mere fact that one is an official and has *political* or other type of *unofficial*, personal influence does not satisfy the requirements of the bribery statute.

The Government rightfully asserts that appellant's attack on the court's charge is untimely. He did not request a charge defining "official act" or distinguishing between "official" and "political" or "personal" influence; his only objection on point at the close of the main charge was so general as to be unavailing;[9] he consented to the reading of the bribery statute and its definition of "official act" in the supplemental charge, and he did not take an exception at the close of the supplemental charge.[10] Ordinarily, of course, appellant would thus be precluded from

---

9 We respectfully except to that portion of your Honor's charge in which you paraphrase essentially the statutes here in issue. . . . [R]eading the statutes and then giving them the elements of the statutes, sandwiched in between would only serve to confuse the jury.

10 Moreover, appellant conceded that the position taken by the trial court vis-a-vis congressional administrative assistants and official acts was correct:

The Court: Let me ask you so I understand your position again. If an administrative assistant to a senator is given some money and the conversation is like this: "Mr. Administrative Assistant, here is X dollars. I would like you to go to Judge A and urge him to be lenient in sentencing B," would that be a bribe?

. . . .

Appellant's Counsel: Yes, sir.
The Court: It would be?
Appellant's Counsel: I think so.

objecting to instructions for the first time on appeal. Fed. R. Crim. P. 30; *see United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).

We do inquire, however, whether the charge was plainly erroneous under Fed. R. Crim. P. 52(b). The parties agree that appellant properly could have been convicted under 18 U.S.C. § 201(b), that is, for conspiring to offer a bribe to Kleindienst for the purpose of terminating or otherwise influencing the prosecutions. If, however, the jury believed Carson's recollection of his conversation with Kleindienst, see note 3 *supra*, which would no doubt lead them to disbelieve the Government's theory that Carson had conspired to bribe Kleindienst, both of which draw support from the jury's questions, see note 8 *supra*, appellant's conviction could be based only upon the charge under § 201(c), that Carson himself conspired to take a bribe in return for exerting his own influence for the illegal purposes. In the same light, while a conviction under § 201(c)(2) (based on fraud) would nevertheless be quite proper on the evidence, the same under § 201(c)(1) or (3) would necessitate a clear understanding on the part of the jury of the meaning of "official act" [(1)] and "act in violation of his official duty" [(3)].

The wording of the statutory definition of "official act" (which was read to the jury) nearly upsets appellant's argument at the start. Such an act is "any decision or action on any question, matter, cause, suit, proceeding or controversy" at any time which might "by law be brought before any public official, in his official capacity, or in his place of trust or profit." 18 U.S.C. § 201(a). Yet appellant contends that any bribe he might have been found to have taken could only be one in return for his being influenced in his personal or political capacity and in

the performance of a personal act. *Compare* 18 U.S.C. § 201(c)(1), note 6 *supra*.

The terms of the written definition of official act have not been altered to any substantial extent since their origin in the Act of July 13, 1866, ch. 184, § 62, 14 Stat. 168. In 1962 Congress consolidated the various prior criminal statutes dealing with bribery into section 201, with the stated purpose of making, in the words of the Senate Report, "no significant changes of substance and, more particularly, [not restricting] the broad scope of the present bribery statutes as construed by the courts." 1962 U.S. Code Cong. & Ad. News 3852, 3853.

There is no doubt that federal bribery statutes have been construed to cover any situation in which the advice or recommendation of a Government employee would be influential, irrespective of the employee's specific authority (or lack of same) to make a binding decision. *See United States* v. *Heffler*, 402 F.2d 924 (3rd Cir. 1968), *cert. denied*, 394 U.S. 946 (1969); *Parks* v. *United States*, 355 F.2d 167 (5th Cir. 1965); *United States* v. *Labovitz*, 251 F.2d 393 (3rd Cir. 1958); *Wilson* v. *United States*, 230 F.2d 521 (4th Cir.), *cert. denied*, 351 U.S. 931 (1956); *Krogmann* v. *United States*, 225 F.2d 220, 225 (6th Cir. 1955); *Hurley* v. *United States*, 192 F.2d 297, 300 (4th Cir. 1951); *Canella* v. *United States*, 157 F.2d 470, 480-81 (9th Cir. 1946). The policy foundation on which this interpretive approach rests is central to the administration of justice at all levels of representative democracy:

> It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions. Therefore, society deals sternly with bribery which would substitute the will of an interested person for the judgment of a

public official as the controlling factor in official decision. The statute plainly proscribes such corrupt interference with the normal and proper functioning of government.

United States v. *Heffler, supra*, 402 F.2d at 926, *quoting United States* v. *Labovitz, supra*, 251 F.2d at 394.

While "[n]ot every person performing any service for the Government, however humble, is embraced within the terms" of the bribery statute, *Krichman* v. *United States*, 256 U.S. 363, 366 (1921), appellant, as an administrative assistant to a member of the Senate Judiciary Committee, clearly is, in a situation in which his influence in connection with federal criminal charges or penalties is sought. 18 U.S.C. § 201(a). The United States Supreme Court, in *United States* v. *Birdsall*, 233 U.S. 223, 230-31 (1914) (citations omitted), has written:

> Every action that is within the range of official duty comes within the purview of these sections [antecedents of 18 U.S.C. §§ 201(b), (c)]. . . . To constitute it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the department under whose authority the officer was acting. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities. In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery.

Appellant testified that as a part of his job and under the applicable "procedure that goes on at Capitol Hill," he as an administrative assistant to Senator Fong would exert influence on various agencies and branches of the Government "without any strings attached." This would be done on behalf of the Senator's constituents and political contributors and their friends to help them with their problems. In this case, however, appellant argues that if he did accept a bribe to help the "friends" here involved, through the use of influence, he was embarking not on an official act but merely on a "personal frolic of his own," quoting the unrelated case of *United States* v. *Cho Po Sun*, 409 F.2d 489, 491 (2d Cir.), *cert. denied*, 396 U.S. 864 (1969).

Appellant's contention is misguided. That administrative assistants as part of their "duties" exert the influence inherent in their employment relationship with members of Congress appears "clearly established by settled practice," in the language of *United States* v. *Birdsall*, *supra*, 233 U.S. at 231.[11] Moreover, even if the objective of the use of influence here might be categorized as "personal," the determinative factor is that the primary source of any conceivable influence on the Justice Department was the official position held by appellant, enhanced as it was by the status of his employer's membership in the one most powerful congressional committee affecting that Department's operations. It cannot be forgotten that the Attorney General's authority over federal criminal prosecutions is

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11 The closeness of the relationship and its effect have been stated, in another context, as follows:

> It is not only accepted practice, but, we would think indispensable, for a legislator to have personal aides in whom he reposes total confidence. This relationship could not exist unless, during the course of his employment, the aide and the legislator were treated as one.

United States v. *Doe*, 455 F.2d 753, 761 (1st Cir. 1972).

the broadest, 28 U.S.C. §§ 509, 516, but also involves ultimate responsibility for the administration of "all Federal penal and correctional institutions." 18 U.S.C. § 4042(1).

It is the corruption of official positions through misuse of influence in governmental decisionmaking which the bribery statutes make criminal.

The evidence, especially the tape recordings of December 29, convinces us that it would not be unreasonable for the jury to have believed that Carson conspired to accept a bribe in return for an unlawful exertion of the influence inherent in his official position as a member of the staff of a member of the Senate Judiciary Committee. Apparently he, and those bribing him, thought he had access to the Justice Department through his position that would enable him to alleviate, if not altogether quash, pending Justice Department action or bring about lenient post-conviction treatment. Thus, while the court's charge as to official act may have been narrow in terms of what it could have been if the language of *Birdsall, supra,* 233 U.S. at 230-31, had been utilized, we hold that the charge was in no manner misleading and that appellant's conduct herein constituted an official act within the meaning of the bribery statute.

Also in relation to the conspiracy count (Count One), appellant maintains that the moving papers were duplicitous in that the single count charged both (1) that the defendants conspired to quash an investigation and a pending indictment by offering a $100,000 political contribution to the Deputy Attorney General of the United States; and (2) that the conspirators agreed to pay $2,500 to appellant to obtain leniency for Joseph Bald and to prevent further indictments. A pretrial objection on this ground was made in a motion to dismiss, and appellant requested on the eve of trial that the Government be required to elect

which conspiracy it would prosecute. The court below denied the motion and the request, results with which we agree. It is well settled that "[t]he allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects.'" *Braverman* v. *United States*, 317 U.S. 49, 54 (1942) (citations omitted); *cf. United States* v. *Barash*, 412 F.2d 26, 34-37 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969). *See also United States* v. *Lubomski*, 277 F. Supp. 713, 716-19 (N.D. Ill. 1967); 1 C. Wright, Federal Practice & Procedure § 142, at 306-10 & cases cited 310 n.20 (1969). Count One set forth two means, which fell within alternative provisions of 18 U.S.C. § 201, by which the Government contended 18 U.S.C. § 371, the conspiracy statute, was violated; hence, it was not duplicitous.

Another of appellant's contentions is that he was deprived of a fair trial as a result of certain testimony given by then Deputy Attorney General Kleindienst. Apparently to convince the jury that appellant had not attempted to offer a bribe to Kleindienst on November 24, 1970, defense counsel on cross-examination elicited from Kleindienst that he had made no report of that day's conversation with Carson until a week later, after he had been shown, on December 1, 1970, a memorandum from the Director of the FBI to the Attorney General about an investigation involving Carson. Kleindienst then testified that on November 24, 1970, he did not think that in their conversation Carson had offered him a bribe, and that had he thought so, he would have reported it immediately.

On redirect examination the trial judge disallowed questions relating to the nature of the information contained in the FBI memorandum. Kleindienst then responded affirmatively to the question, "After learning what you

learned on December 1, 1970 with regard to the fact that there was an investigation involving Mr. Carson, did you then consider what had happened on November 24th to have been a bribe offer?" Although defense counsel made no objection to this testimony at the time it was given, appellant now argues that because it was based on hearsay and called for Kleindienst's opinion as to whether appellant was guilty of the crime charged, the testimony was so extremely prejudicial and violative of appellant's sixth amendment confrontation rights as to deny him a fair trial.

The question on redirect, unlike that on cross-examination, undoubtedly was prejudicial; furthermore, it called for a statement of opinion based not upon personal observation but upon inadmissible hearsay evidence, *i.e.*, the government memorandum. Hence, the answer elicited was not qualified by knowledge and was objectionable. *See* 2 J. Wigmore, Evidence § 657, at 762 (3rd ed. 1940).

We do not find plain error in this admission, however. The question arose on redirect. It was in rebuttal to a matter probed on cross-examination, seeking to cast doubt on the witness's credibility at trial. It ill behooves the defense to argue prejudice here, having failed to object to the improper question on redirect, when the reach of the cross-examination invited, if not required, explanation by the witness of his failure to recognize in the first instance an approach which the Government now was prosecuting as an attempt to bribe.

Appellant raises two novel claims to defeat his conviction for perjury. The first is that his invocation of his fifth amendment privilege against self-incrimination before the grand jury, just after his perjurious testimony, amounted to an implicit recantation of those prior responses. This argument is wholly devoid of substance.

There is no real evidence that appellant testified mistakenly[12] or carelessly, and hence *United States* v. *Norris*, 300 U.S. 564 (1937), stands squarely in his way; moreover, as the Government correctly points out, assertion of the fifth amendment privilege does not by itself imply any fact. *See Grunewald* v. *United States*, 353 U.S. 391, 415-24 (1957).

The second claim is that since the prosecution had the tape recordings of the conversations held in Senator Fong's office as well as the testimony of Brana and Hellerman, there was no doubt whatsoever that appellant had met the persons inquired about, and therefore appellant's answers to the questions were not material to the grand jury investigation. Appellant misunderstands the purpose and operation of the perjury statute, 18 U.S.C. § 1621. "Essentially, the statute punishes lying under oath before a federal official or tribunal . . . . To be within the reach of section 1621, the lies must be material, which in this case means that 'the false testimony . . . [must have] a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation.'" *United States* v. *McFarland*, 371 F.2d 701, 703 (2d Cir. 1966), *cert. denied*, 387 U.S. 906 (1967); *United States* v. *Marchisio*, 344 F.2d 653, 665 (2d Cir. 1965). The "natural effect or tendency" obviously flows from an assumption on the part of the speaker that the tribunal will believe what he says. On this basis materiality refers to the connection between the words said only by the accused and the objective of the investigation; other testimony which the grand jury has heard, except as it may tend to delimit the objective of the inquiry, is therefore irrelevant to a de-

12 Appellant argues he was mistaken. *E.g.*, he claims to have known Edward Adams only as Eddie Adams, therefore accounting for his nonrecollection of the former name.

termination of materiality. And we think it equally obvious that had appellant's false statements been believed, the natural effect would have been to impede the grand jury's investigation.

Appellant raises several additional claims which do not warrant extended discussion. His claim that the refusal of the trial court to sever the perjury count from the remaining counts of the indictment deprived him of a fair trial is controlled by *United States* v. *Sweig*, 441 F.2d 114, 118-19 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971). There as here the commonality of proof of the conspiracy and perjury crimes permitted joinder of the offenses under Fed. R. Crim. P. 8(a) and denial of appellant's Rule 14 pretrial motion for severance. Furthermore, since appellant failed to renew his motion for severance of the counts on the eve of the trial, there is authority that he may not raise the claim on appeal. *Id.* at 119.

Appellant next asserts, with reference to the tape recordings and transcripts of them, that the trial court erred: (1) in admitting the tapes into evidence; (2) in not instructing the jury that they could reject the tapes in whole or in part because portions were inaudible; and (3) in allowing the jury to retain the transcripts during the trial. We disagree.

Prior to trial the court ordered counsel for both parties to listen to the tapes to determine where they disagreed as to the words heard on the tapes. An *in camera* hearing was later held, prior to the introduction of the tapes or transcripts into evidence, and three transcripts were made of the tapes. The parties agreed that the transcripts accurately reflected the words on the tapes, with certain exceptions as to which it was agreed that the transcripts would contain the version believed accurate by each party. The Government agreed with most of the changes sought

by defense counsel, and on the most damaging tape, that of the December 29th meeting, agreed to delete certain words and substitute the word "inaudible." An explanation of how the tapes were made was given to the jury, and the tapes and transcripts were admitted; it is undisputed that the tapes played to the jury contained no deletions, splices or additions.

The court having taken these precautions, we hold that it was not an abuse of discretion to admit the tapes and transcripts into evidence nor error to allow the jury to retain the transcripts during the trial and their deliberations. *United States* v. *Koska,* 443 F.2d 1167, 1169 (2d Cir.), *cert. denied,* 404 U.S. 852 (1971); *see United States* v. *Weiser,* 428 F.2d 932, 936-37 (2d Cir. 1969), *cert. denied,* 402 U.S. 949 (1971); *United States* v. *Kaufer,* 387 F.2d 17, 19 (2d Cir. 1967). We also find that the trial judge's instructions regarding the use of the tapes were proper and hold that appellant's requested instructions correctly were rejected.

Appellant's contentions concerning the propriety of the Government's summation at trial and the involvement of the chief trial prosecutor in the preceding investigation are without merit.

Therefore, the judgment is affirmed.

APPENDIX B

Constitutional and Statutory Provisions Involved

United States Constitution

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

United States Code

18 U.S.C. § 2

"§ 2. Principals

"(a) Whoever commits an offense against the

United States or aids, abets, counsel, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

18 U.S.C. § 201

"§ 201. Bribery of public officials and witnesses

"(a) For the purpose of this section:

"'public official' means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

"'person who has been selected to be a public official' means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

"(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

"(1) to influence any official act; or

"(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

"(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

"(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

"(1) being influenced in his performance of any official act; or

"(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

"(3) being induced to do or omit to do any act in violation of his official duty; or

"(d) Whoever, directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, Commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom; or

"(e) Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom—

"Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

"(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because

of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

"(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

"(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom; or

"(i) Whoever, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of the testimony under oath or affirmation given or to be given by him as a witness upon any such trial, hearing, or other proceeding, or for or because of his absence therefrom—

"Shall be fined not more than $10,000 or imprisoned for not more than two years, or both

"(j) Subsections (d), (e), (h), and (i) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by

the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

"(k) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title."

Added Pub. L. 87-849, § 1(a), Oct. 23, 1962, 76 Stat. 1119, and amended Pub. L. 91-405, Title II, § 204(d)(1), Sept. 22, 1970, 84 Stat. 853.

18 U.S.C. § 371

"§ 371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

APPENDIX B

Constitutional and Statutory Provisions Involved

18 U.S.C. § 1521

"§ 1621. Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States." As amended Oct. 3, 1964, Pub. L. 88-619, § 1, 78 Stat. 995.

18 U.S.C. § 1952

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promite, manage, establish, carry on, or facilitate the promotion, management, establment, or carrying on, of anu unlawful activity,

and thereafter performs or attempts to perform any

of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury."
Added Pub. L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498 and amended Pub. L. 91-513, Title §II, 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-208

ROBERT T. CARSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1972. The petition for a writ of certiorari was filed on August 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

18 U.S.C. 201, 371 and 1621 are set forth at Pet. App. B 28a-33a.

QUESTIONS PRESENTED

1. Whether on the facts of this case intercession with officials of the Department of Justice to secure favorable treatment for defendants in a federal criminal prosecution constitutes an "official act" within the meaning of 18 U.S.C. 201, when the intercession is corruptly made by the administrative assistant to a member of the Senate Judiciary Committee.

2. Whether certain testimony, which was elicited from a government witness on redirect examination without defense objection and pertained to a subject explored on cross-examination, deprived defendant of a fair trial.

3. Whether petitioner's claims of privilege before the grand jury constituted retraction of his previous false testimony.

4. Whether the prosecutor's statements and actions deprived petitioner of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having conspired to travel in interstate commerce in furtherance of bribery (as defined in 18 U.S.C. 201), in violation of 18 U.S.C. 371 (count one), and of having committed perjury

before a federal grand jury, in violation of 18 U.S.C. 1621 (count four).[1] Two co-defendants, Joseph Bald, who testified at trial for the government, and Edward Adams, were charged with conspiracy and with having traveled in interstate commerce in furtherance of bribery; both pleaded guilty prior to trial. Petitioner was sentenced to concurrent terms of imprisonment for eighteen months and was fined $5,000 on the conspiracy count. The court of appeals affirmed in a comprehensive opinion (Pet. App. A 1a-25a).

The evidence showed that in the fall of 1970, Joseph Bald and Michael Hellerman learned that they were the subject of federal investigations relating to stock transactions. Hellerman suggested that they contact Edward ("Eddie") Adams, a man regarded by both as exercising considerable political influence, to see if he could halt the investigations (T. 547-548).[2]

Through the intercession of Bald's brother-in-law, co-conspirator Harold Blond, Bald met with Adams in November 1970, informed him of the pending investigations by the Securities and Exchange Commission and the United States Attorney's office, and requested his assistance in stopping the investigations (T. 549-550, 1033-1034). Adams agreed to help and indicated the matter would involve a con-

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[1] Petitioner was acquitted on two substantive charges of having traveled in interstate commerce in furtherance of bribery, in violation of 18 U.S.C. 1952 (counts two and three).

[2] "T." refers to the transcript of proceedings at trial.

siderable sum of money (T. 550, 1034). Adams informed Bald that he would attempt to arrange a meeting with petitioner, then administrative assistant to United States Senator Hiram Fong (T. 551, 1035). Adams indicated that the money would go to Senator Fong and to individuals in the Justice Department (T. 552, 1035).[3]

Shortly thereafter, Blond informed Bald that Adams had arranged a meeting in Washington, D.C. with petitioner, and in mid-November, Bald and Hellerman met with petitioner at the New Senate Office Building (T. 552, 554-555, 1036). Hellerman advised petitioner that he and Bald were under investigation and that indictments were expected in the near future. He offered petitioner $1,000,000 to abort the S.E.C. investigation (T. 557). Petitioner inquired whether the expected indictments might somehow be delayed and Hellerman indicated that delay was doubtful. Petitioner said he would look into the matter and later contact them through Adams (T. 556-558).

On November 19, 1970, an indictment—charging securities fraud, the sale of unregistered stock, mail fraud, and conspiracy—was filed in the Southern District of New York, naming Hellerman and fifteen others as defendants and Bald as a co-conspirator (T. 560). The following day, Adams informed Blond that he had spoken with petitioner who had indicated

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[3] There was no indication that Senator Fong was aware of the events leading to petitioner's conviction.

he was quite concerned about the persons named in the indictment, but, at best, could help only Bald and Hellerman (T. 1038).

On November 24, 1970, petitioner, having previously arranged an appointment (T. 1143), met with Richard Kleindienst, then Deputy Attorney General. Mr. Kleindienst testified that petitioner informed him that "he had a friend in New York who was in trouble, and that if I [Kleindienst] could help him with respect to his trouble, his friend was a man of substantial means and would be willing to make a contribution of between fifty and one hundred thousand dollars to the reelection of President Nixon" (T. 1143). When informed that the friend was under federal indictment, Mr. Kleindienst advised petitioner that he could not under any circumstances do anything about the matter, even look into it (T. 1143-1144). The conversation then shifted to another matter, a judicial appointment from the State of Hawaii (T. 1133-1144).[4] Mr. Kleindienst, in response to questioning on cross-examination, indicated that at the time of the meeting, he did not believe he had been offered a bribe (T. 1171, 1174-1176). It was

[4] Petitioner testified that the meeting with Mr. Kleindienst was solely for the purpose of discussing a controversy surrounding a pending judicial appointment. He stated that he mentioned the fact that two persons had approached him about a problem and had indicated a willingness to make a contribution of $50,000 to the Republican Party. Petitioner also testified that he told Mr. Kleindienst that because there was an S.E.C. indictment, he had informed the men that he could not help them and that Mr. Kleindienst had stated he was correct in doing so (T. 1383-1384).

established that information concerning an investigation involving petitioner was later brought to his attention through an F.B.I. report to the Attorney General (T. 1168-1171).[5] On redirect examination, Mr. Kleindienst indicated that the report caused him to conclude that petitioner had in fact offered a bribe (T. 1178) and he reported the substance of his conversation with petitioner to the Attorney General (T. 1144-1145).

Shortly after the indictment was filed, Hellerman, who at this point was cooperating with the government, informed Bald that he knew someone who was willing to finance a "fix" and that he wanted that person to meet Adams (T. 562). Bald, again through the intercession of Blond, met with Adams, informed him that someone was available to provide $200,000 to fix the case, and arranged a meeting (T. 563-565).

On November 29, 1970, Hellerman met with Bald and Blond and introduced F.B.I. Agent Paul Brana to them as "Paul Bicera," the man who was going to finance the "fix" (T. 565, 1040, 1045). Brana feigned skepticism as to Adams' ability to fix the case, and Blond, relating numerous activities of Adams, attempted to persuade him that Adams was sufficiently influential (T. 630-631). Blond also informed Brana that United States Senator Hiram Fong was a member of the Judiciary Committee and could handle the matter (T. 631). He told him of the previous meeting with petitioner and indicated that

[5] The trial court disallowed questioning about the nature of the information contained in the F.B.I. report (T. 1177-1178).

$200,000 would be required to cover Bald and Hellerman on the pending as well as any future indictments (T. 629, 635).

Adams then arrived at the meeting and advised that because the indictment was filed so shortly after the meeting with petitioner, petitioner had not had time to act. Adams assured Brana that Senator Fong, as a member of the Judiciary Committee, was quite influential in Washington. He also stated that Attorney General Mitchell had given his handshake on the matter (T. 567, 636). Brana continued to feign skepticism and Adams stated that in order to satisfy Brana he would arrange a meeting between him and petitioner (T. 637). A meeting was arranged (T. 570, 1056).

On December 1, Brana, equipped with a recording device, went with Blond and Adams to Senator Fong's office in Washington. Petitioner met privately with Adams for a brief period and then with Blond and Brana, who was introduced to petitioner as Paul Bicera (T. 640-641, GX 4).[6]

Petitioner indicated to Brana that "[they] might have been able to do something" had Hellerman and Bald been successful in delaying the indictment (GX 4, p. 1). Petitioner also indicated that in the future, after the publicity had died down, he might be able to obtain leniency for Hellerman (GX 4, p. 1). Brana inquired whether "as far as the two fellows we are interested in * * * [was there any] chance to get it

[6] "GX" refers to government exhibits (here, the transcripts of the recordings) introduced at trial.

squashed" and petitioner responded, "No, and that's from the top man" (GX 4, p. 3). Petitioner again explained that the case was "too hot" because of the publicity and advised Brana not to waste his money at this time (GX 4, pp. 2, 4).

Brana thereafter informed Adams that the $200,000 had not been deposited in the bank pursuant to prior arrangements. Adams became perturbed and returned to advise petitioner concerning the money. Blond and Brana returned to New York and during the trip Brana learned that he was supposed to have brought $2,000 for petitioner (T. 644-645, 1066-1068).

Bald, Hellerman and Brana met on December 22. Bald expressed concern over possible new indictments and urged Brana to have the $200,000 available. Bald also assured Brana that petitioner was in a position to handle any new indictments (T. 646-648). On December 24, Brana again met with Bald, Hellerman and Adams. Adams advised that petitioner could handle the problem of new indictments and that because of his and Blond's involvement elsewhere, Brana would have to deal directly with petitioner. He informed Brana that a new price of $100,000, all of which was for petitioner, had been set and that Brana and petitioner should work out a schedule of payment related to the manner in which petitioner performed. Adams then asked for and received from Brana $200 in expense money. Adams also asked whether Brana had the $2,500 to be given petitioner as an advance, and Brana showed him the money (T. 651, 655).

On December 29, Brana, again equipped with a recording device, met with Adams and gave him the $2,500 in cash. Adams and Brana then went to Senator Fong's office where Adams, having made it clear that the money was for petitioner, gave him the $2,500 (GX 1a, p. 3; T. 656). Brana then advised petitioner that new securities indictments against Bald and Hellerman were anticipated and that, if they were filed, the leniency for Hellerman which petitioner had mentioned previously would be virtually impossible to secure (GX 1a, pp. 3, 4, 6). Petitioner indicated that he would try to stop the indictments but was unsure of success even though he claimed to "deal right off the top on these things" (GX 1a, pp. 4-5). Petitioner stated that he would need to know in advance if the indictments were to be filed and Brana advised that they were being prepared. Petitioner said he would work on the matter (GX 1a, p. 12). A price of $100,000 was agreed upon if petitioner stopped the new indictments and obtained leniency for Hellerman. Although discussion of the details of the manner in which payment would be made was deferred, petitioner hinted it would be in the form of a campaign contribution (GX 1a, pp. 13-14).

On January 6, 1971, petitioner, in response to a subpoena, appeared before a federal grand jury in the Southern District of New York. He was fully advised of his rights and was informed that he was a target of the investigation. He denied knowing or having ever heard the names of Adams, Bald, Heller-

man or "Bicera." He was shown a photograph of Agent Brana and stated that he did not recognize him (GX 1a, pp. 7-8; T. 1273). After further questioning, petitioner refused to answer several questions, including ones concerning his involvement with Adams and "Bicera," on grounds of self-incrimination and congressional immunity (Pet. 18-19).

Petitioner testified at trial and denied any participation in a scheme to pay or receive a bribe. He stated that he believed the $2,500 received from Adams was a campaign contribution for Senator Fong from a Robert Brinsmade. He acknowledged the meeting with Bald and Hellerman but denied Bald's version of that meeting. He also acknowledged the meetings with Adams, Blond, and Brana but denied that they were conducted pursuant to a bribery scheme. He characterized the recorded incriminating statements which were introduced into evidence as attempts on his part to terminate the conversations (T. 1450).

Petitioner conceded at trial that his grand jury testimony had been inaccurate but claimed he had not recognized Brana from the photograph and had denied knowing Edward Adams because he knew him as Eddie Adams (T. 1412).

ARGUMENT

1. Petitioner contends (Pet. 20-28) that, although he could properly have been convicted of having conspired to offer then Deputy Attorney General Kleindienst a bribe for the purpose of influencing the

course of a criminal prosecution (Pet. 25), he was erroneously convicted of conspiracy to accept a bribe to influence his own "official acts." His contention is that his actual and promised intercession with the Department of Justice involved his "personal" or "political" activities rather than "official acts" within the contemplation of 18 U.S.C. 201. He argues in support of this position that as administrative assistant to a senator he was not a public official empowered or apparently empowered to affect the course of a criminal proceeding. Because the court's charge (Pet. 22) permitted the jury to convict petitioner on this allegedly improper basis, he argues that the conspiracy conviction cannot be sustained.[7]

It is clearly established, however, as the court below noted (Pet. App. A 17a), that the federal bribery statute extends to conduct of a government employee whose advice or recommendation would be influen-

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[7] In the court of appeals, petitioner's primary argument related to the alleged inadequacy of the court's instructions with respect to conspiracy to commit bribery and the definition of "official act" found in 18 U.S.C. 201. Petitioner never requested an instruction on "official act" nor did he make any meaningful objection to the court's instructions (Pet. App. A 15a; T. 1766-1767).

After deliberating for approximately thirteen hours, the jury requested clarification of the definition of bribery, the relation thereto of "official acts," and other matters (T. 1842-1857). The court reviewed the jury's requests with counsel and indicated what its proposed responses would be. Defense counsel agreed that the court should read the bribery statute to the jury, including the definition of "official act" contained therein (T. 1842-1843), and took no exception to the supplemental charge.

tial, regardless of whether the official is without specific authority to make a binding decision with respect to the matter. See *United States* v. *Heffler*, 402 F. 2d 924, 926 (C.A. 3), certiorari denied *sub nom. Cecchini* v. *United States*, 394 U.S. 946; *Parks* v. *United States*, 355 F. 2d 167, 168-169 (C.A. 5); *Wilson* v. *United States*, 230 F. 2d 521, 524-525 (C.A. 4), certiorari denied, 351 U.S. 931; *Krogmann* v. *United States*, 225 F. 2d 220, 224-225 (C.A. 6); *Hurley* v. *United States*, 192 F. 2d 297, 299-300 (C.A. 4); *Canella* v. *United States*, 157 F. 2d 470, 480-481 (C.A. 9). Here the district court instructed the jury that a finding of bribery could not be sustained if the action sought "was so far outside the purview of the official's duties or possible power or possible authority that it would be unreasonable for any reasonable man to have supposed that he could have done anything about that particular subject" (T. 1868). Petitioner did not except to this charge. There is certainly no reason to believe the instruction, which was adequate to prevent conviction in the absence of a finding that petitioner appeared officially empowered to act on behalf of Bald and Hellerman, was ignored by the jury, which was painstaking and conscientious in its deliberations. See Pet. App. A 12a, n. 8.

There was sufficient evidence from which the jury could conclude that the object of the conspiracy was to gain corruptly the use of petitioner's official position as Senator Fong's administrative assistant, to influence the course of existing or anticipated crimi-

nal prosecutions, and that the objective was an apparently realistic one. Petitioner represented that he was, under certain circumstances, in a position to bring influence to bear upon decision-making with respect to federal criminal investigations. Petitioner's official duties included exerting the influence of the Senator's office on behalf of the Senator's constituents and others in their dealings with governmental agencies (T. 1380-1381, 1514, 1538). As the court of appeals noted, the exertion by administrative assistants of "the influence inherent in their employment relationship with members of Congress appears 'clearly established by settled practice,' " citing *United States* v. *Birdsall*, 233 U.S. 223, 231 (Pet. App. A 19a). Attempts to influence other branches of government are "an established and accepted part of the role" of Congressmen. *United States* v. *Brewster*, No. 70-45, decided June 29, 1972 (slip op., p. 23; and see *id.*, p. 11).[8] As the court below further observed, petitioner's official position as it related to

[8] Petitioner argues in light of the "horsetrading" that takes place in representing the interests of constituents that it is unlikely that Congress intended such exertions to be outlawed by Section 201 (Pet. 28). But the critical fact is this: the present prosecution does not involve a good faith effort by a legislator or his aide to bring to the attention of a government agency the merits of a constituent's cause. Instead, what was proved here was a corrupt deal which envisioned substantial personal profit for a government official for influencing the criminal process. Whatever may be the range of permissible entreaty under other circumstances, Congress has made it a crime under Section 201 to agree to accept "anything of value" for this effort.

dealings with the Department of Justice was "enhanced * * * by the status of his employer's membership in the one most powerful congressional committee [Senate Committee on the Judiciary] affecting that Department's operations" (Pet. App. A 19a). Thus, petitioner clearly appeared empowered to act (*United States* v. *Birdsall*, 233 U.S. 223), and he was represented to Bald, Hellerman and Brana not as a private individual with personal political influence but as the administrative assistant to Senator Hiram Fong of the Senate Judiciary Committee.

Petitioner held himself out as being able to reach persons highly placed in the Justice Department (GX 1a, pp. 4-5), and he did have access to high Department officials. The key importance of his official status in promoting this scheme is underscored by the fact that the meeting with Mr. Kleindienst at which petitioner appeared to make the offer of a bribe was arranged for the ostensible purpose of presenting Senator Fong's views with respect to the filling of a vacant judicial position (T. 1381-1386). In these circumstances, it is evident that petitioner's attempt to exert influence on behalf of Bald and Hellerman was made while petitioner was acting in an official capacity and not in the capacity of a private "influence peddler" engaged in "a personal frolic of his own" (Pet. 27).

The jury was reasonably entitled to conclude, as did Adams, Bald, and Hellerman, that petitioner's influence derived from his official position. His acceptance of money to exert that influence on behalf of

Bald and Hellerman was precisely the kind of conduct at which the federal bribery statute is aimed—the misuse of a public office for personal gain.

2. Petitioner claims (Pet. 29-32) that he was deprived of a fair trial by the admission of certain opinion testimony from then Deputy Attorney General Kleindienst. On cross-examination, defense counsel elicited from Mr. Kleindienst that he had made no report of the November 24th conversation with petitioner until the following week, when he had been shown an F.B.I. memorandum to the Attorney General concerning an investigation involving petitioner (T. 1168-1171). Defense counsel also asked whether, as of November 24, he believed that petitioner had offered him a bribe and Mr. Kleindienst responded that he had not initially interpreted the conversation as a bribe attempt (T. 1174).

On redirect examination, the trial court sustained an objection to questioning related to the nature of the information contained in the F.B.I. memorandum (T. 1177-1178). Mr. Kleindienst was then asked whether, after having learned of the investigation of petitioner, he considered the November 24th conversation with petitioner to have been a bribe offer. Without objection he said yes (T. 1178).[9]

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[9] Petitioner's contention (Pet. 31) that the question was in direct violation of the court's ruling is erroneous. The trial court's prior ruling prohibited questioning about facts brought to Mr. Kleindienst's attention on December 1, 1970, not his state of mind on that date.

The court of appeals concluded that the question —"a statement of opinion based not upon personal observation but upon inadmissible hearsay evidence, *i.e.*, the government memorandum"—was objectionable. The court, however, concluded that its admission was not plain error since the question was posed "in rebuttal to a matter probed on cross-examination, seeking to cast doubt on the witness' credibility at trial" (Pet. App. A 22a). This holding was proper and warrants no further review. The power to notice plain error should be exercised "cautiously and only in exceptional circumstances" (3 Wright, *Federal Practice and Procedure: Criminal* § 856, p. 373), and if any error was committed by the trial court in admitting Mr. Kleindienst's testimony, it was not of such magnitude as to warrant its exercise here.

3. Petitioner also contends (Pet. 33-35) that his claims of congressional privilege and of the privilege against self-incrimination with respect to questions concerning his involvement with Bald, Adams, and Brana constituted a retraction of his previous answers. The court below aptly termed this argument "wholly devoid of substance" (Pet. App. A 22a). Assertion of the privilege against self-incrimination (and, by analogy, of a congressional privilege) does not, as the court of appeals noted, imply any fact. See *Grunewald* v. *United States*, 353 U.S. 391, 415-424. Claims of privilege cannot reasonably be construed as acknowledgements and retractions of false testimony.

4. The court of appeals properly rejected petitioner's final contention (Pet. 35-39) that "the prosecutor's credibility and personality became such central factors that the petitioner was deprived of a fair trial" (Pet. 35). The transcript references relied upon by petitioner (Pet. 35; T. 1445, 1465-1468, 1507-1508, 1653-1656, 1674, 1683) do not show or even suggest that the prosecutor's personality and credibility were in any way "factors" or in issue at the trial. The prosecutor, Assistant United States Attorney Morvillo, had participated in the investigation leading to Hellerman's indictment and he was thus familiar with some of the people and events which formed the background of the conspiracy in which petitioner participated; contrary to petitioner's suggestion (Pet. 39), this history made it appropriate for Morvillo to prosecute this case, and it did not turn the case "into a contest between himself and the petitioner" (*ibid.*).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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